AN

ESSAY

ON THE

REGISTRY LAWS

OF

LOWER CANADA.

BY JOHN BONNER, A. M.,
Barrister.

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THE Author trusts that the importance of familiarising the Public with Laws which ought to be "household words," will serve as his apology for publishing this Essay. It contains little that is new; but nothing, he hopes, that can mislead.

A preface might perhaps have been dispensed with, had it not afforded him an opportunity of acknowledging his obligations to Mr. Lafontaine's *Analyse de l'Ordonnance sur les bureaux d'Hypothèques*—a work which, had it been translated into English, and enriched with the recent Statutes and Decisions, would have rendered this Essay superfluous—and to the Honbles. Judge Meredith, Judge Duval, Henry Black, Q. C. and Thomas Pope, Esq., to whose friendly counsels and judicious suggestions, whatever is valuable in the following pages may be ascribed.

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CHAPTER I.

INTRODUCTION.

1. *Importance and extent of the subject.*
2. *It is entitled to the grave attention of all.*

1. There is no Law in our Statute Book which claims a more careful examination at the hands of the public than the Registry Ordinance. For, whether we consider the extent of the reforms it introduced into our jurisprudence, or the increased stability it has given to financial operations, or the magnitude and variety of the interests it affects, it stands alone, and without a rival. As the Law of mortgages, in the language of M. de Saint Réal, when founded on just and sound principles, gives life to public and private credit, but, when ill-digested, is the ruin of both (a) : any statute, which effects a thorough revision of that Law, and places it on an entirely new basis, must

(a) Rapport du Cit. St. Réal. Conférences sur le Code Civil, VII., p. 98.

be of the highest practical importance either for good or evil.

2. Though its prime object was merely to establish Registry Offices, it sweeps, in fact, over the whole field of the Law of Real Property: creating obligations and imposing duties on every individual who possesses any stake whatever in the Country. As such, it is entitled to the grave attention of all. To the Lawyer, to the Notary, to the Merchant, to the Landholder, to the Capitalist, to every one who may be placed in the position of borrower or lender, purchaser or vendor of Real Estate, a thorough knowledge of its provisions would seem indispensable.

And while policy, and a due regard to their own interests require the rich man and the speculator to make constant reference to its text, an acquaintance with its bearings on the social relations of life is no less indispensable to all who have contracted, or who contemplate marriage, to every man who hopes to occupy the position of a father of a family. On the rules it establishes depends the scanty pittance of the widow: the ignorance of a single clause or paragraph may snatch from the orphan the means which parental foresight and affection had laid up for his maintenance. On a correct interpretation of its doctrines rests the minor's right to claim his patrimony: the faithful observance of the formalities it prescribes, can alone preserve to the helpless interdict, the provision which humane friends or relations have made for his support. In fact, there is no one so insignificant who may not some day be affected by its provisions. In whatever sphere of life we are placed—by whatever social ties we are bound —whatever responsibilities we have accepted—and whatever domestic authority we exercise—it is our bounden duty to ourselves, and to those over whom we are set, to acquire a personal knowledge of a Law on which so much of our happiness and their welfare depends.

To estimate the alterations it effected in our Common Law, it is necessary to cast a hasty glance over the different systems which have obtained in France.

SECTION I.

OF THE HYPOTHECARY LAW OF FRANCE.

3. *Of the secret hypothecs of the Roman Law.*
4. *Of the Registres de nantissements in certain Provinces of France.*
5. *By the Common Law of France, all encumbrances were secret.*
6. *All Hypothees were general.*
7. *And were granted for indeterminate sums of money.*
8. *Fruitless attempts to introduce a system of publicity.*
9. *Law of Messidor, an III.*
10. *Law of* 11 *Brumaire, an VII.*
11. *Code Civil; deviations from the Law of Brumaire as to Transcriptions of title deeds.*
12. *As to the inscription of Legal Hypothecs.*
13. *As to hypothecations of future property.*
14. *As to Hypothecs for undetermined amounts.*

3. Under the Roman Law, hypothecs were not necessarily known to any but the contracting parties: the purchaser or lender had no other guarantee than the good faith of his vendor or borrower, and no other remedy in case of deception, than a prosecution for the fraud, which was technically called *Stellionatus.*

4. A similar Jurisprudence prevailed in most of the French Provinces, slightly modified by its contact with the feudal system. In Laon, Rheims, Ribermont, Montreuil, Chauny, Ponthieu, Bonlonnais, Péronne, and Roye, public Registers were kept, in which mutations and certain encumbrances on real estate were recorded (a). But the formalities attending entries in these Registers

(a) Guyot, Repertoire Vo. Nantissement.

(called Registres de Nantissements, de Saisines, de Vest et Devest, de Contrôle) were cumbrous and troublesome; they afforded no evidence of tacit or legal hypothecs, and had, according to M. Lamoignon, in his time fallen into disuse. (a)

5. In that part of France where the Custom of Paris was law, there was no means of ascertaining the encumbrances on real property, or its mutations from one proprietor to another. The purchaser and hypothecary creditor were at the mercy of the party with whom they dealt. The former, who had paid the purchase money, was exposed to be ejected by a claimant under a sale prior to his own: the latter might discover, after he had lent his money, that his security was already pledged beyond its value. A prosecution for *Stellionat* was a very poor consolation, savouring more of vengeance than redress. The position of the hypothecary Creditor, in fact, under a system which clothed all notarial instruments with a general hypothecary character, was so little improved by the authentic security, that we learn without surprise, that frauds were of constant occurrence, and the flow of capital into the rural districts extremely limited.

6. Again, at common Law, all hypothecs were general, and affected all the immoveable property of the debtor. Thus, where the owner of several estates, each worth 10,000 livres, had borrowed 8000 livres, and granted an obligation for that sum, each estate was separately hypothecated to within a trifle of its full value, and the debtor could not, without selling part of his property, obtain further loans. Landed estate worth three or four times the amount of a debt was thus rendered unavailable.

7. To this evil was added another of no less magnitude. Hypothecs were granted for indefinite and unde-

(a) Lamoignon Arrêtés, II. p. 103, 105.

termined sums of money. Thus, when a faithful statement of the presumed amount or value of the encumbrances on a property, was laid before a purchaser or a capitalist, he was often unable to form anything but a vague conjecture as to the actual amount of liability, with which the property would be charged on their final liquidation. Did he consent to advance money, prior claims which had appeared insignificant from being underrated, often swallowed up the whole proceeds of his pledge: did he allow the risk to deter him from lending, the liquidation of his predecessors' hypothecs sometimes proved that he had lost a good investment, and the owner of the property the benefit of a loan.

8. These defects in the law were not unnoticed by Statesmen and Jurists. Though Basnage, D'Aguesseau, and one or two others, professed alarm at new-fangled systems, Loyseau and D'Héricourt are loud in their denunciations of secret encumbrances (a): the learned President Fabre calls it a monstrous state of things, (b) while Sully, Colbert, and other magistrates applied their intellects to the search of a remedy for the evil.

The able men who, while the kingdom was distracted by civil and religious strife, had just given to the world that monument of wisdom, the Edit de Blois, had attempted, in 1581, to apply to the whole of France a system somewhat similar to that of the ***Registres de nantissements*** (c): but the experiment had been a failure, and the Edict had been repealed in 1588. Colbert, with more practical sagacity, drew an Edict establishing Bureaux d'Enregistrement, and containing the germ of the

(a) Loyseau, de l'act. hyp., Liv. III., No. 16; D'Hericourt, Vente d'immeubles.

(b) De error. pragm., Dec. 1.

(c) Edit de création d'un bureau de contrôle des actes extra-judiciaires en chaque siége royal. Juillet 1851

principle of publicity (a): but it shared the fate of its predecessor, and was annulled in 1674, one year after its promulgation. Any attempt, says Persil, to bring to light the condition of the large landed estates would have ruined the credit of the courtiers of the day (b), and was not to be thought of for a moment.

The expensive expedient of a *décret volontaire*, and the recourse to a ratification, under the Edict of June 1771 (which afforded no relief to lenders of money), were the only means provided by the old French Law, for ascertaining the liabilities, and facilitating transfers of real property.

9. The first attempt of the statesmen of the revolution to supply the deficiency, the law of Messidor, An III, is barely worthy of a passing notice. It would have had the practical effect of converting all real estate into moveable property, and giving it a forced circulation by means of Registrar's certificates. Framed more with a view to relieve the temporary embarrassments of the public Treasury, than to afford any security to private capitalists, it was never carried into execution, and was soon replaced by the memorable law of the 11 Brumaire, An VII.

10. To this Law—the work of Sièyes, and the circle of eminent men by whom he was surrounded—France and many foreign countries owe their systems of registration. Adopting, as a starting point, the principle shadowed forth in the Edict of 1673, the Law of Brumaire established three main rules: 1st. That all conventional hypothecs should be special; 2ndly. That all encumbrances should be registered, and the registers open to the

(a) Edit de Mars, 1673, portant établissement de greffes pour l'enregistrement des oppositions des creanciers hypothécaires.

(b) Persil, Reg. Hyp., Introd., p. 6.—"Les gens de la cour n'eussent pu trouver des ressources quand leurs affaires eussent été découvertes." Testament politique de Colbert.

public; and 3rdly. That all titles to real estate should be recorded.

Thus all voluntary hypothecs, which did not contain a specification of the property affected, were declared to be illegal, null, and void (a). Legal and judicial hypothecs were confined to the property possessed by the debtor at the time of the inception of the hypothec (b). All hypothecs, legal and judicial, as well as voluntary, were to rank according to the dates of their inscription, in the *Registres* of the *conservateur:* and privileges were inert until so incribed (c). No conveyance or transfer of real estate passed the property to the purchaser, until it was transcribed in the *Registre des Transcriptions* (d).

By this Law, the evil under which France had groaned for centuries, was at length cured. No creditor or purchaser could, under its operation, complain that he had been the victim of fraud or concealment: the Registers were open to the public: every one could tell, at a glance, the exact position of his debtor. Such a system was calculated to revive public confidence, and to place private credit on a sounder basis than it had occupied for years.

11. It was not, however, adopted in its integrity by the Code Civil. On grounds which Mr. Troplong justly characterises as "*d'une incroyable légéreté*," (e), the *Conseil d'Etat* rejected that portion of the Law of Brumaire, which made transcription an essential ingredient in sales, and transfers of real estate. Against this retrogression, the soundest lawyers in France have exclaimed. Mr. Treilhard fought manfully for the system of Brumaire in the Council (o). M. Troplong is unceasing in his attacks upon the doctrine of the Code. In one place he says:

(a) Loi de Brumaire, An VII, Art. 4.
(b) Ib., Art. 2.
(c) Ib., Art. 26.
(d) Troplong, Priviléges et Hypothèques, Preface, No. 20.
(e) Conférences sur le code civil, Vol. VII, Liv. 3, Tit. 18.

"It is the absence of an extrinsic formality, destined to publish all mutations, and to effect the transmission of real property as against third parties, that has given the death blow to our hypothecary system" (a). The fatal consequences of this omission; the perilous position of the purchaser who may be ousted by a prior grantee, whose title has been kept concealed; the inextricable confusion introduced into the case of the privileged vendor; the difficulty of ascertaining whether the party granting a hypothec is really proprietor or not; are forcibly pointed out in various passages of his commentary (b).

12. Another deviation from the Law of Brumaire is found in the articles of the Code which refer to legal hypothecs. The former directed that of the minor and interdict to be inscribed by the subrogate Tutor, or Curator, and the *parens* composing the *conseil de famille*, under a joint and several responsibility in damages (c); and that of the married woman to be inscribed in like manner by her husband (d); declaring that, like conventional hypothecs, they should rank only from the date of their inscription. Several members of the Council were strongly opposed to this harsh rule. The question was put by the First Consul in the following succinct shape: Are we to prefer the security of purchasers and lenders to that of minors and married women? Are the former, who are in possession of their full civil and natural capacity, entitled to the same protection as the latter who are incapable of defending their rights? Almost as a matter of course, it

(a) Troplong, Priviléges et Hypothèques., Preface, No. 27.

(b) Ib., ib. Nos. 20 et seq., 31., 267 et seq., 564 bis et seq. See also XIX Duranton, p. 21, No. 18; Persil, Régime Hyp., Pref. p. 6; M. Jourdain in V Thémis, pp. 228, 229 481, et VI Ib., p. 193. See also, post, chap. 3, sect. 1, art. 1.

(c) Loi de Brumaire, art. 41.

(d) Ib. ib.

passed in the negative (a) : and, while for the information of the public, the Code requires husbands and tutors to inscribe the legal hypothecs on their property, it expressly declares that their failure to inscribe shall not involve any prejudice to those under their authority (b).

13. It was decided by the Law of Brumaire that future property could not be affected by hypothecs of any nature whatsoever (c). This the Council of State appears to have considered as an infringement on the liberty of the subject, whose right to pledge his future property seems as clear as his right to dispose of his future labour. While, therefore, an indirect mode of executing voluntary hypothecs of future property was devised by the Code (d), judgments and legal hypothecs were made to weigh equally on all property present and future (e).

14. No precautions had been taken by the Law of Brumaire to prevent the execution of voluntary hypothecs for unliquidated and uncertain amounts. The Code supplied the deficiency by enacting that all deeds of hypothec, which did not express the exact sum for which they were granted, should be null and void (f).

In other respects, the two systems bear a close analogy to each other.

(a) Conférences sur le C. C., Vol. VII, pp. 116, 136, 142 et passim.
(b) C. C. 2135.
(c) Loi de Brumaire, art. 4.
(d) C. C., 2130.
(e) C. C., 2122, 2123.
(f) C. C., 2132.

SECTION II.

OF THE REGISTRY ORDINANCE.

15. *Of the Law of Lower Canada before the Ordinance.*
16. *Attempts to introduce a new System : 9 Geo. IV., cap. 20.*
17. *Establishment of Register Offices in the English Counties.*
18. *The Registry Ordinance—its character.*
19. *Its sources : all encumbrances must be registered.*
20. *Query : should the hypothecs of the married woman, and minor be subject to registry?*
21. *Registration of privileges.*
22. *Case of the unpaid vendor : necessity for legislative interference.*
23. *Registration of title deeds and conveyances.*
24. *All voluntary hypothecs must be special.*
25. *Registration of wills.*
26. *Query : must servitudes be registered?*
27. *Leases carrying with them proprietary rights must be registered.*
28. *Query : must usufructuary rights be registered?*
29. *Review of the Registry Ordinance.*
30. *What a perfect system of registry would require : its drawbacks.*

15. The old system of general and secret hypothecs was introduced into Canada as part of the jurisprudence of the Prévoté of Paris. Every notarial deed bore a tacit general hypothec. The evils inseparable from such a system were as severely felt here as in France: and as soon as the members of the Canadian Parliament began to legislate in earnest for the country, schemes of Registry Laws were mooted.

16. Bills introducing systems somewhat similar to that of the Code Civil were drawn by Messrs. Vallières de St. Réal, and Fletcher; but the public, accustomed to the old regime, and viewing the innovations in the light of fiscal laws, were slow to render their authors justice, and the projects were never fairly laid before the House. M. Viger framed and carried a bill,

the aim of which was to encourage *décrêts volontaires*, or voluntary sales by the Sheriff: but the great expense of this process, which had been the cause of its abandonment in France, soon made it very unpopular here, and the public were rejoiced when the Act to provide for the extinction of secret incumbrances (9 Geo. IV., cap. 20) was substituted for it. This Act was drawn by Mr. (now the Honorable) Henry Black.

It was a close imitation of the French Edit of 1771, by which parties who were desirous of purging their property, were enabled to do so, by obtaining from the Court letters of ratification of their title, without being forced to incur the expense of a sale by the Sheriff. Though warmly supported by the late Mr. A. Stuart and the Honble. Mr. Vallières, it encountered much opposition both in the Assembly and in the Council, traces of which may be seen in the contradiction between the 7th and 8th sections (a). It became, however, a Law; and under its operation, purchasers were enabled to discharge all encumbrances, except dower *non ouvert* and substitutions, by a judgment of ratification.

This was a grand step towards a system of Registry. It opened the eyes of the public to the iniquity and inconvenience of general hypothecs. It paved the way for the publication of all encumbrances. It exposed, while it partially cured, the evils of the existing regime.

Though a temporary Act, which is continued in force from session to session, the 9 Geo. IV., cap. 20, is obviously an essential complement to an imperfect system of Registry like ours. No prudent man, at the present

(a) It is hardly necessary to remark that the allusion to dower in the 7th section is an oversight; dower *non ouvert* is not purged by a judgment of ratification. *Aliter*, however, in the case of property purchased by a Railway Company, or the Board of Works. See 14 and 15 Vict., cap. 51, 11 ter, and 9 Vict., cap. 37, sect. 9.

day, would pay the price of an estate without a judgment of ratification.

17. Shortly after the passing of this Act, Registry Offices were established in the English Counties of Drummond, Sherbrooke, Stanstead, Shefford and Missisquoi (a). By 1 Will. IV., cap. 3, the Act establishing these offices was amended, and its provisions extended to the lands held in free and common soccage in the Counties of Ottawa, Beauharnois and Megantic; and by 4 Will. IV., cap. 5, lands held by the same tenure in the Counties of Acadie and Two Mountains were placed on the same footing.

It is hardly necessary to refer to the tenour of these Acts, as they only applied to a small portion of the Province, and were repealed in 1841, when the Registry Ordinance (4 Vict., cap. 30) was passed.

18. The Registry Ordinance was draughted by Sir James Stuart, Bart., the present Chief Justice of Lower Canada, while a member of the Special Council in 1840. It became a Law, by the sanction of the Governor, Lord Sydenham, on 9th February, 1841, the day previous to the Union: but was not put in force till the 31st December following.

It is to be regretted that we have no accounts of the debates of the Council at its various readings in committee. Much light is thrown on the obscure portions of the Code Civil by a reference to the *Conférences;* and a similar assistance would have been extremely valuable to the student of the Ordinance. But though we cannot read its text by the light of the arguments on which it was based, though we are compelled to grope through its many obscurities without a guide, no one can fail to recognise, on a careful perusal, the substantial testimony it bears to the extensive learning, and sound practical wisdom of its framer.

(a) 10 & 11 Geo. IV., cap. 8.

19. It resembles closely the law of Brumaire, and the Code Civil, in the sections which relate to hypothecs and privileges; and the English Statutes, establishing Register Offices in York and Middlesex, in its provisions respecting titles to land, conveyances, and wills. The phraseology of these Imperial Acts has, in some instances, been strictly followed.

Thus blending the two systems, it requires all conveyances, and titles to land, all hypothecs, whether conventional, judicial, or legal, and nearly all privileges, to be registered, in order to be operative against subsequent bona fide registered purchasers, or hypothecary or privileged creditors, for valuable consideration. (a)

20. It has been pretended by some critics that the advantages of publicity have betrayed the framer of the Ordinance into a dangerous extreme. Having rendered it compulsory on husbands and tutors to register the hypothecs on their property in favor of their wives and wards, it places these latter on the same footing as conventional mortgagees—among whom priority of registration is superiority of right. Grave objections have been urged against this enactment. It has been said that it is inconsistent with the principles which grant to the married woman and minor a legal, instead of a conventional hypothec, to make the effect of that hypothec depend on the observance of a formality, with which the parties really interested are too often incapable of complying. It has been doubted whether the civil and criminal responsibility of the husband and tutor, be a sufficient safeguard to protect those under their authority from fraud and loss. It has been asked whether the beggared wife, or the ruined orphan, would esteem it any consolation for the loss of fortune, to send a bankrupt husband or guardian to expiate his negligence in a prison. Finally, it

(a) 4 Vict. cap. 30, sect. 1.

has been questioned whether it would not have been more judicious, and more consistent with the spirit of our Law, to have followed the prudent course of the Code Civil and the Code of Louisiana (a); which, having to choose between two evils, have preferred to expose the wary capitalist to a remote risk of loss, which he ought to have foreseen and guarded against, rather than jeopardise the patrimony of the helpless widow andorphan.

On the other hand, the advocates of unrestricted publicity appeal to the German Codes, and argue that the system would have been so imperfectly carried out as to be comparatively valueless, had hypothecs of so common occurrence as those of the wife and minor been allowed to remain concealed. *Lectoris sit judicium.*

21. The Ordinance requires that four classes of privileged creditors, viz. the Architect, builder, or workman, and his subrogated assignee, the coheir or copartitioner, and the creditor, or legatee, who demands a separation of the property of his deceased debtor or testator from that of his heir, should register their Claims. Registration is not, as in the case of simple hypothecary creditors, the test of rank among these: ***privilegia non ex tempore, sed ex causa estimantur.*** The safety of the public reqnires that all encumbrances, as well those which are privileged, as those which are merely hypothecary, should be readily ascertained, and accurately known: but it would be doing violence to the nature of a privilege, to make its right of precedence, as such, depend on the date of its registration. A certain delay is therefore fixed by the Ordinance, during which the above mentioned creditors must register their claims. If they are enregistered within that delay, they rank as privileged claims: if they are not, they lose their privileged character, and fall into the rank of mere hypothecs, ranking from the date of their registration.

(a) C. C. 2135; Code of Louisiana, Art. 3298.

22. It is stated in the Ordinance that the unpaid vendor must register his privileged claim on the property he has sold. But no delay having been fixed for this, as for the other cases of privileged claims, it would seem that he is always in time to register so long as the property exists, or at all events until a Sheriff's sale, or a judgment of ratification purges all encumbrances upon it: and the Courts, viewing the question somewhat in this light, have solved the problem, by deciding that the vendor need not register at all. (a)

It is impossible to conceive any more glaring violation of the principle of publicity, than the immunity thus granted to the vendor. No considerations of humanity, as in the case of the feme coverte, or the minor, can be urged in his favor. His exemption from the general rule goes far to nullify the utility of the whole Ordinance.

The omission of a clause fixing a delay during which he must register—which is the real source of the difficulty—was obviously intentional. It was an imitation of the Code Civil. The propriety of culling from the Code an article which all the Commentators have concurred in assailing, may well be questioned. M. Troplong, Valette, and others of equal eminence, have vied with each other in the severity of the censures they have pronounced upon it. (b)

It is to be hoped that but a short period of time will be allowed to elapse, before the legislature interferes, to supply this deficiency of the Ordinance.

23. In framing the sections which relate to the registration of deeds and conveyances, it is manifest that the Special Council had in view the English Statutes establishing Registry offices in the Counties of York and

(a) See post, Chap. 4, Sect. 1, Art. 1.

(b) Troplong, Privil. et Hyp., No. 267, et passim; Valette, Revue des Revues.

Middlesex.(a) Under these acts, as under the Ordinance, priority of registration gives superiority of title. Of two claimants under deeds, conveyances, or wills, he whose title has been registered the first is to be preferred, whether that title be or be not prior to his rivals. The object of the law—publicity—was thus attained Unfortunately, the Legislature has since thought proper to modify this rule; and now, the want of registration cannot be opposed to a proprietor "in open and public possession of his estate." (b)

There might perhaps have been occasionally some hardship, in the strict application of the rule of the Ordinance to an honest though negligent proprietor. But it is the duty of the Law to punish negligence as well as fraud, and not, as has been done in this instance, to sacrifice a principle to a mistaken fear of rigour. "The "principle that every immoveable must bear record of the "encumbrances attaching thereon, has been lost sight "of"(c): and the wise intentions of the framer of the Ordinance, in founding a register, which, in course of time, would have contained the titles of every proprietor in the Province, have been thus frustrated.

24. The proscription of general hypothecs has been carried out more fearlessly. Not only does the Ordinance prohibit the granting of voluntary hypothecs on unspecified property, but it declares also that judicial hypothecs shall not affect any property of which the debtor or party against whom judgment was rendered, was not in possession at the time of the judgment(d): following, in this particular, the law of Brumaire, in opposition to the Code(e). Nothing but a legal hypothec can affect future

(a) 2 & 3 Ann. cap. 4; 6 Ann. cap. 35; 7 Ann. cap. 20; 8 Geo. IV, cap. 8.
(b) 7 Viet., cap. 22, sect. 9, and 8 Viet., cap. 27, Sect. 7.
(c) Troplong, Privil. et Hyp., No. 265.
(d) Ord. 4 Viet., cap. 30, sect. 30.
(e) Loi de Brumaire, An VII, Art. 4; C. C. 2123.

property. The principle of speciality has even been introduced into this latter class of encumbrances: the general hypothec of the minor or interdict may be made special or certain property only, either by the act of appointment of the Tutor or Curator, or by a subsequent order of a Judge, on the advice of a *Conseil de famille* (a). But this power of restriction does not extend to other legal, or to judicial hypothecs, as in the Code Civil (b).

25. We can trace the English Statutes, already mentioned, in those sections of the Ordinance which require wills to be registered. Neither the Law of Brumaire nor the Code Civil contain any similar provision: the French Jurists do not seem to have considered it necessary. In the Register counties in England, the requirements of the Register Acts with respect to wills are rarely complied with (c).

26. Many of the soundest writers in France have advocated the registration or transcription of all real rights, which are subject to enrolment in the German Codes (d). It seems probable that servitudes or easements are included among the "encumbrances" affecting lands, which the first section of the Ordinance classes with hypothecs and conveyances. This interpretation is confirmed by the language of the Act 6 Victoria, which expressly exempts seigniorial "servitudes" from registration (e): and of the 8 Vict., which states that "the registration of any title to, or instrument creating a charge . . . *or servitude* upon

(a) Ord. 4 Vict. cap. 30, sect. 26, 27; C. C. 2161.

(b) C. C. 2161, et seq. A Bill was introduced by Mr. Badgeley in 1846, or 1847, to amend the Ordinance, which required that judicial hypothecs, and that of the minor on his tutor's property, should be special; but it was thrown out in consequence of defects in the machinery by which the author proposed to carry out his scheme.

(c) Stewart's Conveyancing, III. p. 320; Rigge on Registry, p. 42.

(d) See post, Sect. III., Nos. 33, et seq.

(e) 6 Vict. cap. 15, sect. 2.

any immoveable property", subsequent to the title of the proprietor who is in open and public possession, shall not affect the title of such proprietor (a).

27. The reason which suggests the registration of leases in France does not apply here. By the Code Civil, the purchaser of an immoveable cannot, without an express authority from his vendor, expel a lessee under an authentic lease (b). Thus where the lessee continues to enjoy the property in defiance of the purchaser, the latter finds its value diminished in proportion to the length of time the lease has yet to run. In our Law it is different. *Emptorem fundi non necesse est stare colono.* The purchaser may expel the lessee of his vendor (c). The same necessity does not therefore exist for the registration of leases in Canada as in France. Notwithstanding which, the Ordinance, by expressly exempting leases for a less period than nine years from registration, has, by implication, directed that all leases for a longer period, which, as is known, confer proprietary rights on the lessee, shall be registered (d).

28. It seems probable that usufructuary rights are included in those rights secured, or evidenced by "contracts and instruments in writing . . . whereby . . . lands, tenements, &c. . . . are affected," which, according to the first section, must be registered.

29. The Registry Ordinance has now been in force for upwards of ten years; and, as will be seen in the course of the following pages, has given rise to much litigation. Wide differences of opinion still exist on the meaning and intent of several sections: it is perhaps useless to hope that they will be reconciled, or silenced by decisions of

(a) 8 Vict. cap. 27, sect. 7.
(b) C. C. 1743.
(c) Poth. Louage, Nos. 62, 101, 288, et seq.
(d) 8 Vict. cap. 27, sect. 17.

the courts, before the general codification of the Laws has commenced. Questions respecting servitudes, and quasi-proprietary rights must necessarily arise, and give birth to much discussion. The mode of registering the legal hypothec of married women for dotal property accruing to them during the marriage is quite unsettled: and the opinions of lawyers differ widely on the subject It is far from being generally admitted that this hypothec requires to be registered at all. The case of the vendor will now be appealed from the Courts to the Legislature.

Nor have transitory questions, on the retroactive effect of the Ordinance, arisen less frequently, or involved less weighty considerations. Of these, the number is gradually decreasing: but a fund of litigation still remains, which will put the acutest intellects of the Bench and the Bar to the test.

These facts convey no reproach. Dealing with a subject of so vast a scope as the whole Law of real property, no man, however great his powers, could hope to leave no problem unsolved, no contingency unforeseen. We should rather wonder that a Law of twenty-five pages could have accomplished so much, and worked so well, than complain that any thing has been omitted.

30. How difficult a thing it is to devise a perfect system of Registry, may be learnt from the reports of the English Commissioners, and their criticisms on the Laws of other countries.

Such a system would require, in the first place, the registration of all deeds transmitting, hypothecating, or encumbering real property. It ought even to include a record of transmissions by inheritance. Obedience to such a rule could not probably be enforced, without a decree of absolute nullity against unregistered deeds. Under such a system, no tacit or general hypothec could

be permitted to exist. The claims of married women, minors, and the Crown, as well as judicial hypothecs, would be specially recorded, for a fixed sum, against some specific property. It might be advisable to impose the duty of registering the former upon the notary or judge. All privileges would be abolished, and special hypothecs granted in their stead. To registers based upon this principle, the index ought to be one of estates, and not of proprietors, the latter being obviously an unsafe guide, in a country where property is continually changing hands. An index of estates, to be worth anything, would require to be based on a survey and a map of the whole Province, dividing it into ranges and lots like township lands; every town lot would be marked under a separate number.

On no principles but these, or others not less stringent and complete, could a perfect system of registry be based. Whether the advantages to be derived from such a system would counterbalance its draw-backs—its expense—its cumbrousness—its harshness towards married women, minors, and privileged creditors—the dangerous power it would place in the hands of the Registrar, and the great responsibility of his office—and, finally, the embarassment and confusion which would reign during the period of transition from the old to the new regime, is a question which may possibly engage the attention of the legislature at no very distant period.

SECTION III.

REVIEW OF FOREIGN SYSTEMS.

31. Before closing this Chapter, it may not be irrelevant or uninteresting to cast a cursory glance over the hypothecary systems of some foreign countries. In the language of M. Troplong, "The study of comparative legislation is the best school for learning to grapple with the deep problems which the science of law presents"(a)

32. While France was sinking into bankruptcy, under a régime of secret encumbrances, Germany, Austria, Prussia, and Hungary owed to the feudal system their exemption from a similar evil. By their feudal lords, laws had been established, which assimilated hypothecs to alienations, and gave to the Seignior a mutation fine on both. The protection both of their usurped and their

(a) Troplong, Privil. et Hyp., Preface, No. 5.

lawful rights required the enrollment in a General Register of all deeds affecting real estate within their Seigniory: and thus, the very machinery which modern jurists consider the safeguard of private credit, was, in its origin in Germany, an instrument of spoliation, and a guage of rapine. (a)

33. The transition from these fiscal Registers, (not unlike the French *Registres de nantissements*) to the stringent rules of the modern hypothecary Laws of the Teutonic nations, was easy and natural. Tutored by the symbolical rites of the feudal law, and accustomed to the cumbrous formalities attending hypothecations, and conveyances of lands held *en fief* or vassalage, the Prussians cannot have looked upon the Code which was promulgated by Frederic William II in 1794, as an innovation. The title which referred to hypothecs was a mere transcript of the *Hypotheken Ordnung* of the previous year, and introduced no new doctrines. The Courts of Justice were substituted for the Seigniors: all mutations were required to be notified to them within a year. In these Courts, *Cadastres*, or land registers, with map-indexes, were kept, and a description of all the real estate within their jurisdiction succinctly entered therein, a separate number and leaf being appropriated to each immoveable (b). All hypothecs, legal, conventional, and judicial, and all real rights were ordered to be inscribed in this register under pain of absolute nullity (c): the only exemptions from registration being granted to a few unimportant privileges, such as funeral expenses, servants' wages, two years taxes, &c. The Judges were instructed to refuse

(a) Rapport du C. B. de Préaumeneu, Conférences sur le C. C., v. VII., p. 81.

(b) Prussian Code, Arts. 390, 392.

(c) Ib., Arts. 391, 411, 436.

to register any deed or claim which did not specially affect some certain specific property. (a)

The great advantage of the Prussian Law thus consists in the unrestricted publicity which it imposes on all transactions affecting real property: in which respect it is probably unsurpassed by any other Code. On the other hand, the grievous restraints which it places on the transfer of real estate, its cumbrousness, (the Registers are counted by tens of thousands), prolixity, and expense are grave objections.

34. Few points of difference exist between the Prussian and the Austrian Codes. The *Gesetzbuch* of Austria, published in 1810, embodies with some slight modifications the Hypothecary Institute of 1758. It declares that a deed of hypothec only confers a personal right: the *jus in re*, or hypothec, is acquired by inscription in the Register of debts (b). In like manner the delivery consequent upon the sale or transfer of an immoveable, is made by transcription in the *Grundbuch* or Land Register (c).

Both in Prussia and Austria, and likewise in some of the Swiss Cantons and Sweden and Norway (d), registration is a judicial Act. Property is transferred or hypothecated by sentence of a Court of Justice. It would be an enterprise of great difficulty to naturalize so arbitrary and inquisitorial a system, however obvious were its advantages, among a people accustomed to constitutional liberty.

35. The hypothecary systems of Bavaria, Wirtemberg, and Greece, though obviously of Teutonic origin, have some points of resemblance to the French Code.

(a) Ib., Art. 449. Rhenish Prussia, which was formerly a dependency of France, is still governed by the Code Civil.

(b) Gesetzbuch, or Aust. Code, Art. 451.

(c) Ib., Arts. 487, 488.

(d) See St. Joseph's collection of Foreign Codes.

In Bavaria, as in Austria, deeds confer neither hypothec nor title. To the public authorities alone, belongs the power of imposing encumbrances on property. Hypothecs and titles are operative from the moment of their entry in the Registers only (a). No hypothec can be inscribed unless it be for a fixed sum of money: thus the conjugal rights of married women, and the claims of minors against their tutors, are estimated by the Court at a fixed sum, for which the hypothec is inscribed (b). General hypothecs are expressly prohibited: even in the case of minors, the hypothec must be entered against some specific property belonging to their tutor (c). On the Board of Hypothecs devolves the duty of registering the legal hypothec of married women, and unpaid vendors: and in case of omission on their part, the registration fund is held responsible (d). In like manner and under a similar responsibility, the judge who appoints a tutor must see that the *Acte* of appointment is registered (e). The registers are open to the inspection of any one who is interested in examining them (f).

36. The Law of Wirtemburg so closely resembles the Bavarian Law in its general principles, that it is hardly necessary to mention it separately. It may, however, be observed, that no deed affecting real property acquires any validity in Wirtemberg, until it has been approved by the Hypothecary Court; after their sanction has been obtained, the owner is discharged from further concern or responsibility in the matter. The Court is liable for all errors or illegalities. (g)

(a) Law of Bavaria, 1st June 1822, Arts. 1, 9, 21, 26.
(b) Ib., Arts. 11, 19, 20.
(c) Ib., Arts. 12, 22.
(d) Ib., Art. 98.
(e) Ib., Art. 20.
(f) Ib. Art. 24.
(g) Law of Wirtemberg, 15th April 1825, Articles 2, 57, 96, 233, et seq.

37. The Hypothecary Law of Greece, framed in 1836, also starts with the announcement, that hypothecs are acquired by inscription in the Registers (a), but betrays the fatal influence of the French Code, in the omission of any provision for the transcription or enrolment of titles to real estate.

38. Perhaps the most complete, logical and consistent of the systems which have resulted from a judicious fusion of the Teutonic and French elements, the most remarkable compromise ever attempted between the two classes of Codes—is the scheme laid before the *Conseil d'Etat* of Geneva, in 1827, by MM. Bellot, Girod, and Rossi.

No real right, said this bill, shall be held such in law, unless it be entered in the Register of real rights (b). Thus, under its provisions, all titles to property, whether by gift, sale, exchange, cession, partition, devise, inheritance, or otherwise, were invalid against a subsequent purchaser unless registered (c). No hypothec was effectual unless the name of the hypothecator appeared in the Register as proprietor (d). Besides holding out these inducements to purchasers to register, notaries were directed to inscribe all deeds of mutation executed before them within a week after their execution. (e)

Having thus secured the publicity of titles to real estate, the bill next directs that all other rights connected with property, *jura in re*, such as usufructuary rights, rights of occupation, servitudes, authentic leases, *antichrèses*, testamentary dispositions involving substitutions, rights of redemption or *rémeré*, judgments, sequestrations and seizures shall be likewise entered in the register (f). Pas-

(a) Law of Greece, 11th August 1836, Articles 1, 16.
(b) Projet de loi, Art. 1.
(c) Ib., Arts. 17, 18, 27, 35, 48.
(d) Ib., Art. 82.
(e) Ib., Arts. 17, 18.
(f) Ib., Arts. 57, 58, 71.

ing to hypothecs, it follows the German doctrine in declaring that until registration is effected, the creditor shall have a mere personal right, ***un droit à l'hypothèque;*** and this applies equally to all classes of hypothecs (a). Under the head of legal hypothecs are enumerated, besides the claims of married women, minors and interdicts, the donor's claim for the ***charges*** of the gift, the vendor's for his purchase money, the copartitioner's for ***soulte et retour***, and the architect's for labour and materials (b). The ***Conservateur***, or Registrar, is bound ***ex officio*** to register the claim of the donor, copartitioner and vendor (c). The notary who executes the marriage contract is required to fyle it with the ***Conservateur*** within one week after it is passed. And the duty of inscribing the hypothec of the minor falls upon the ***Chambre de Tutelles*** (d). In the two last cases, the hypothecs must be inscribed for a fixed sum, at which the future rights of the parties are estimated, and on property specially described (e).

This brief sketch would be very incomplete, if no notice were taken of the scheme of ***prénotations***, which, in common with most of the German Codes, this bill adopted. "Any party," says M. Bellot, "who brings an action claiming either a real right in an immoveable, or the discharge or reduction of an inscription (against him) may, during the litispendency, make his claims public by means of a ***prénotation*** (or provisional registry) in the Register of real rights." (f) The effect of this prenotation is to prevent any inscriptions being taken on the property until the rights of the ***prénotant*** are determined by

(a) Ib., Art. 128.
(b) Ib., Art. 85.
(c) Ib., Arts. 86, 87, 88, 140.
(d) Ib., Arts. 98, 107.
(e) Ib., Arts. 95, 99, 106, 108, 109.
(f) Ib., Art. 209.

the Court (a). If he succeed in his suit, the registrar is bound, on sight of the judgment, to convert the prenotation into a definitive inscription (b). In like manner, a party whose title cannot, from some temporary reason, be validly inscribed for the present, may preserve his rights by a provisional prenotation (c). So, architects must effect a prenotation of their first *Procès Verbal*, as a basis for their hypothecary claim for labour and materials (d); and creditors or legatees must enter a prenotation within three months after the inscription of the heir's title, if they demand a separation of his property from that of the deceased (e).

These are the leading features of this admirable project. It was presented in 1827, by the Conseil d'Etat to the Grand Council, who referred it to a Committee of Jurists. The latter body, at the suggestion of Judge Lafontaine and M. Forget, members of the Committee, declined to report until a law of transition, "*Loi transitoire*," had been laid before them. M. Bellot appears to have undertaken the task: but the events of 1830 diverted his attention and that of his Colleagues from the subject: and at his death, which occurred shortly afterwards, no complete sketch of his design was found among his papers. Since then, no official notice has been taken of his *projet de loi*, though it has served as the basis of some foreign legislation. The Canton is governed by the Code Civil, as modified by some local enactments—the most important of which are the Law of 28th June, 1830, making registration of deeds of alienation compulsory, and the Law of 28th June, 1820, requiring deeds creating rights of usufruct, leases, servitudes, &c., to be inscribed. (f)

(a) Ib., Art. 213, 214.
(b) Ib., Art. 215.
(c) Ib., Art. 211.
(d) Ib., Arts. 91, 92.
(e) Ib., Arts. 230, 231.
(f) Letter from Mr. Forget to the author, Geneva, 8th March 1852.

39. These systems are all derived from one common stock. The Teutonic element pervades them all to a greater or less degree. The Code Civil has also given birth to several cognate systems: such are the Codes of the Two Sicilies, of Sardinia, of Belgium, and of Louisiana.

Few deviations from the Code Civil are to be found in the Code which was published at Naples, after the restoration of the Bourbons. Notaries are required to register marriage contracts passed before them, and Justices of the Peace and their Clerks to present *Actes de tutelle* to the Registrar. (a) But, notwithstanding these additional precautions, the legal hypothecs of the wife and minor exist independently of registration. (b) Enrolment is of no value whatever as a test of title to property. (c)

40. The Sardinian Code has at least the merit of more originality of design. In some of its provisions, it reminds the reader of the German systems. Thus, legal as well as voluntary and judicial hypothecs, are inert until registered. (d) As though this deviation from the Code had alarmed the Piedmontese legislator, a formidable array of functionaries—Notaries, Judges, Clerks, parents, tutors, and husbands—are enjoined to register the hypothecs of the wife and minor. (e) Legal and judicial hypothecs attach on all the property present and future of the debtor, within the limits of the Registry Office wherein they are inscribed. (f) Both privileges and legal hypothecs may be validly registered within a delay of three months after their creation (g).

(a) Code of Two Sicilies, Arts. 2027, 2028, 2031.
(b) Ib., Art. 2021.
(c) Ib., Art. 2081.
(d) Sardinian Code, Arts. 2202, 2214, 2215.
(e) Ib., Arts. 2221, et seq.
(f) Ib., Art. 2246.
(g) Ib., Arts. 2205, et seq.—When M. Troplong observes that according

41. There does not seem to be any practical difference between the hypothecary system in force in Belgium, and the *Code Civil*, except that in the former State, the laws of the 3rd January, 1824, and 1st April, 1845, make transcription necessary in all cases of alienation of real property (a).

42. In the Code of Louisiana, as revised in 1828, the chief deviations from the Code Napoleon are the articles requiring notaries to inscribe the deeds passed before them, and judges to register appointments of tutors and curators (b); and the rule that privileges must be enregistered within six days (c). If not registered within that delay, the claims of the vendor, the architect, &c., lose their privileged character, and fall into the rank of mere hypothecs (d). This six day rule has been also extended to voluntary hypothecs, which, if registered within that period, rank from the date of the execution of the deed of hypothec (e). Whether any advantage is derived from this system, which can counterbalance the danger arising from the retroactive effect given to entries in the Registers, is perhaps a matter of doubt.

43. Such are a few of the foreign systems which are traceable to the example of the Code. The English Register Acts form a separate and distinct category.

As early as 1535, it was thought expedient to guard against fraudulent and secret transfers of land by enacting (27 Henry VIII, cap. 16) that all Bargains and Sales should be enrolled at Westminster. In 1617, Sir Francis

to the Sardinian Code, the vendor, and some legal Mortgagees are dispensed from registering (Priv. et Hyp. Pref. No. 8), he refers to the old hypothecary system of Sardinia. M. Troplong wrote in 1832; the Sardinian Code was promulgated on 1st. January, 1838.

(a) Règlement pour la conservation du Cadastre de Belgique, Art. 1.

(b) Code of Louisiana, Art. 3334.

(c) Ib., Art. 3240.

(d) Ib., Art. 3241.

(e) Ib., Art. 3319.

Bacon prevailed upon James I, to establish, by letters patent, an Office called the "Office of general remembrance of matters of record," which corresponded very closely to our Registry Office; but no successors appear to have been named to the original incumbents. During the Commonwealth, Bills for "abstracting and registering all conveyances and matters of record," were, on several occasions, brought into Parliament: Mr. Commissioner Whitelock and St. John appearing to have taken the lead in the matter. Ten years were consumed by the Committees in hearing evidence and deliberating; a draught of a Bill was even printed; but, in 1659, the subject seems to have been dropped.

A few years afterwards, a committee of the Lords reported that the insecurity of titles to real property was one of the causes of "the decay of rents and the value of lands," and a general Register was again spoken of. No bill was however presented, nor indeed do any further steps appear to have been taken in Parliament, until, in consequence of a pamphlet, published by Sir Matthew Hale, in 1694, earnestly recommending a system of registry, the Act 2 and 3 Anne, Cap. 4, establishing a local Register in the West Riding of York, was passed. This again drew public attention to the subject; and the example of West Riding was followed, shortly afterwards, in 1707, by the East Riding, and in 1708, by Middlesex. The inhabitants of the North Riding of York obtained a similar Act in 1735. By these Acts it was declared that all deeds, conveyances, and wills, should be deemed fraudulent, and void, against subsequent purchasers or mortgagees, for valuable consideration, unless a memorial of the same had been registered before the registering of the conveyance under which such subsequent purchasers, or mortgagees claimed (a): and that no judgment,

(a) 6 Anne, c. 35, sect. 1; 7 Anne, cap. 20, sect. 8; 8 George IV., cap. 6.

statute, or recognizance (except those entered into on behalf or in favour of the Crown) should affect lands until they were registered (a).

Attempts were made by the Counties of Surrey and Derby to obtain similar local Register Offices, but without success. Public attention being now, however, thoroughly awakened, a general Register Act was again introduced in 1736, and, having passed the Commons, was read and amended by the Lords; but the sudden prorogation of Parliament seems to have stopped its progress. The fear and cupidity of those who conceived their revenues would be affected by such a law were now aroused; and petitions from the Clerks in Chancery, the Solicitors and Attorneys poured with such effect into the Commons, that, when introduced again in 1758, the Bill did not survive a second reading. So well organised, in fact, was the opposition of these parties, that more than half a century elapsed before the subject was again mooted in Parliament.

Even in 1815 and 1816, when Sir Samuel Romilly, and others attempted to carry bills framed on the basis of that of 1739, the enemies of Registration succeeded in a motion that the bills be read that day six months.

In consequence of the Report of the Real Property Commissioners, in 1830, Mr. John Campbell (now Lord Campbell) made repeated but unsuccessful endeavours in the Commons to carry a general Registry Act: but the current of public opinion was decidedly against the innovation. Renewed exertions by Lord Campbell in the Lords, and by Mr. William Brougham, Mr. Cayley, and Mr. Tooke in the Commons, met a similar fate.

Finally the report of the Committee appointed to inquire into the burdens on Land in 1846, revived the ques-

(a) 6 Anne, cap. 35, sect. 19; 7 Anne, cap. 20, sect. 18. The other provisions of these Acts will be noticed hereafter.

tion of the expediency of a general register. A Committee consisting of Lord Langdale, Lord Beaumont, Jos. Humphrey, Henry Ker, Walter Coulson, George Frère, and Franc. Broderip, was appointed in 1848, to inquire "whether the burdens on land could be diminished by the establishment of an effective system for the registration of deeds." They reported in the affirmative, in 1850. It remains to be seen what legislative action will be taken on their advice.

44. The opposition which the various attempts to establish a general register in England have encountered, is a matter of some astonishment. That the Clerks of Enrollment, and Solicitors, and Attornies should strain every nerve to defeat a bill, by which the dignity and emoluments of their offices might have been diminished, was perhaps to be expected, and is hardly worth notice: but when Sir William Blackstone, and Sir Edward Sugden throw their weight into the scale against a Register Act, the prestige of their authority will unsettle the convictions of many minds. Still, however profound be the respect due to the sentiments of such eminent men; a candid enquirer can hardly fail to perceive that the weight of reason is on the side of their adversaries. Even the illustrious name of the author of the Commentaries cannot—when he argues that, because the carelessness of registrars in York and Middlesex has given rise to lawsuits, therefore the system is bad (a)—make the reasoning pass current among thinkers: nor can the high reputation and judicial fame of the Baron of St. Leonards induce us to coincide with him, when he says that having, in his extensive practice, seldom heard of fraudulent mortgages or conveyances, their occurrence cannot be sufficiently frequent to warrant a general register. (b)

(a) Blackstone, Commentaries, Book II., p. 342.

(b) Shall we register our deeds? By Sir E. Sugden, London, 1852, p. 22.

The Law should guard against the possibility as well as the probability of frauds. His objections founded on the expense of a system of Registry (a), and indeed all the other arguments which he has brought to bear upon the question, have been amply refuted by the Commissioners in their Report, to which reference may be made by those whose respect for his name begets a reluctance to admit that he can be in error. (b)

45. Scotland has long enjoyed the benefits of a system of Registry. In 1617, the Act of the 22nd. Parliament of James VI. Cap. 16 established "Registers of Sasines," in which all deeds transmitting, or creating, or extinguishing encumbrances on real property, are required to be recorded. This Act has since been amended by various Acts of Parliament, and acts of sederunt by the Courts of Session; and the system is said to have been brought to a high pitch of perfection.

46. Most, if not all, of the States of the American Union, have passed laws similar in their effect to the Statutes of Anne. Purchasers and mortgagees are everywhere directed to record their conveyances, and deeds of mortgage; the penalty of neglect being, in most cases, loss of right when opposed to a more vigilant adversary. (c)

The legislatures of Upper Canada, Nova Scotia, and New Brunswick, have, in like manner, adopted with some modifications, the rules which govern the local Registers in York and Middlesex. (d)

(a) Ib., p. 4; Report of Commissioners published by order of the House of Commons.

(b) Ib., p. 13.

(c) Rev. Stat., New York, Part 2, Chap. 3, Sect. 1; R. S. Vermont, Chap. 6 et seq., &c., &c.

(d) U. C. Stat., 9 Vict., cap. 34, repealing 35 Geo. III, cap. 5; N. S. 32 Geo. II, Chap. 2; N. B. 26 Geo. III, cap. 3.

CHAPTER II.

OF THE EFFECT OF THE REGISTRY LAWS ON TITLES TO REAL PROPERTY.

47. *Modes of acquiring Property in Lower Canada.*

47. By the Common Law of Lower Canada, real property is acquired by inheritance, by prescription, by devise, by gift, or by the effect of contracts and obligations. (a) Titles by inheritance, (b) and by prescription, being granted by the Law, independently of any act of the parties, do not require registration.

All other titles must be registered, to be operative against subsequent ***bonâ fide*** registered privileged or hypothecary creditors, or purchasers for valuable consideration. (c)

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SECTION I.

OF THE REGISTRATION OF TITLES.

48. *All titles to property must be registered.*
49. *The nullity consequent on non-registration is only relative.*
50. *Requisites necessary in order to invoke this nullity.*
51. *Both titles must be derived from the same auteur.*
52. *That of the party invoking the nullity must have been registered.*
53. *It must have been granted for valuable consideration.*
54. *It must have been obtained bonâ fide—contradiction involved in the first section.*

(a) C. C., Arts. 711, 712; IV Toullier, No. 62, p. 60.
(b) *Aliter* in Bavarian law, and M. Bellot's projet: see supra Nos. 35, 38.
(c) Ord. 4 Vict., cap. 30, sect. 1.

55. *The party sought to be ousted must not be in open and public possession.*
56. *Where these requisites are combined, priority of registration is superiority of right.*
57. *Suggestion to purchasers.*
58. *Titles prior to 31st Dec.* 1841, *need not be registered.*

48. It has already been observed that no system under which title deeds escape registration, can claim to be based on principles of publicity. All the mischief produced by the Code Civil has been traced to this source.(a) In Germany, the enrolment of title deeds is as essential to the transmission of property as the inscription of hypothecs is to their effect. (b)

Our law lays down the broad rule that "all deeds, conveyances, contracts, and instruments in writing (executed subsequently to 31st Dec., 1841), whereby any lands, tenements, hereditaments, real or immoveable estates, in this Province, shall, or may be alienated, or conveyed" maybe registered. (c) The words "deed, conveyances, contracts or instruments in writing" include, it is presumed, all the various modes, (with the exception of wills and deeds of gift) by which, under our law, one man can transfer to another his right of property of an immoveable. Such are sales, exchanges, partitions, cessions, dationes in solutum, leases for a longer period than nine years, &c.

49. But the Ordinance has not, like some foreign systems, declared that an unregistered title is absolutely null, and of no effect in passing the property from vendor to purchaser. As between these the contract is complete without registration, and the property passes. But quoad third parties, hypothecary or privileged creditors, or pur-

(a) Troplong, Priv. et Hyp., No. 27; M. Jourdain, Droit de Propriété, p. 481.

(b) Supra, Chap. I., No. 33 et seq.

(c) Ord. 4. Vict. cap. 30, sec. 1; So in York and Middlesex by 6 Anne cap. 35—7 Anne, cap. 20; 8 Geo. 2, cap. 6; U. C. 9 Vict., cap. 34.

chasers, registration alone authenticates a title. Among rival claimants of an immoveable, it is the test of right. Thus, the Law decides that, where a question of title arises between two bona fide purchasers for valuable consideration, from the same vendor, he whose title has been registered the first shall be preferred. So a purchaser who has neglected to register cannot oppose his title to registered privileged or hypothecary creditors of his vendor, though their hypothecs or privileges were registered after the execution of his title. (a) In regard of them, the unregistered conveyance is waste paper: and the property is still liable for their claims.

50. To enable a subsequent purchaser or hypothecary creditor to avail himself of the nullity consequent upon the non-registration of a proprietor, his title or hypothec must be derived, directly or indirectly, from the same grantor or mortgagor as such proprietor holds under (b)—it must be registered—it must have been granted for valuable consideration—and must have been obtained, ***bonâ fide***, in good faith (c).

51. The first requisite is obvious. Registration cannot give validity to a title or hypothec granted by one who had no power to convey or hypothecate: nor can the neglect of one man to register, be, of itself, a title of adventitious acquisition to another. An appeal to the Registers lies only in the case where the titles of both contending parties are traceable to the same ***auteur***.

52. The title of the party pleading the non-registration of his adversary, must itself have been registered. On his superior diligence rests his claim to be preferred: else, ***in pari jure melior est conditio possidentis*** (d).

(a) Pouliot vs. Lavergne, 1 L. C. Rep., 20.
(b) Ord. 4 Viet., cap. 30, sect. 3.
(c) Ib., sect. 1.
(d) So in 6 Ann., cap. 35; 7 Ann., cap. 20.

53. It must have been granted for or upon valuable consideration, and must not be a collusive contrivance with a dishonest vendor, or debtor, to defraud the first purchaser, or hypothecary creditor (a).

54. Finally, the subsequent purchaser or creditor must have acted *bonâ fide*. The proviso at the end of the first section of the Ordinance, renders the interpretation of this requisite a matter of no small difficulty. It is therein declared that no knowledge of a prior unregistered sale or hypothec shall vitiate the title of a subsequent purchaser (b). According to the Ordinance, therefore, the man who buys a piece of land which he knows has been sold the day before to another, who has neglected to register his title—he who speculates on the carelessness of his neighbour—may notwithstanding be acting *bonâ fide*. And while his vendor commits the crime of stellionat, and may be indicted, he, no less guilty in intention, and clearly an accomplice in the fraud, is not only held to have acted in good faith, but is entitled to claim the arm of the law to despoil the victim of his cunning.

This proviso was added to the Bill in the Council on motion of the Crown Lawyers. (c) It was opposed by Sir James Stuart, who deemed it so injurious and contradictory to the spirit of the first section, that he actually voted against his own Bill after it was incorporated with it. (d) The object of the Attorney and Solicitor General

(a) So in 6 Ann., cap. 35; 7 Ann., cap. 20.

(b) Ord. 4 Vict., cap. 30, sect. 1, in fine.

(c) Journals of the Special Council, 24 Dec. 1840. The division was as follows: for the proviso, Moffatt, Quesnel, Molson, Austin, Mondelet, Harwood, Hale, Ogden, Daly, Day: against, the Chief Justice, McGill and Knoulton.—See for a review of the doctrine of notice, Hargrave and Butler on Co. Lit. Inst. 1; Lord Hardwicke, in Hine vs. Dodd, therein quoted; Commentaire sur l'ordonnance de 1747; Œuvres de D'Agueseau; Rigge on Registry, p. 10, et seq.

(d) Ib., ib.

was doubtless to prevent intricate questions arising, as to what constituted notice of a prior sale or encumbrance—questions which might often have involved much uncertainty, confusion, and perjury—and to establish one general invariable rule, that nothing short of actual registration should confer an indisputable title. Whether the evil thus avoided be or be not of greater moment than the evil introduced by the proviso—the temptation it offers to parties disposed to commit frauds—is a question which may admit of controversy. In the Courts of Equity in England (a), and in Louisiana (b), where notice to a subsequent purchaser protects the rights of the prior grantee, the judges do not seem to have considered the question as one of unusual difficulty. But, at all events, after the clause had been carried, consistency would seem to have required the expurgation of the words "*bonâ fide*" in the previous clauses. As they stand, it is difficult to assign a reasonable interpretation to them.

55. When these requisites are combined in the person of a subsequent purchaser or hypothecary creditor, it is further necessary, in order that he may invoke the forfeiture pronounced by the Ordinance, that the party sought to be molested or ousted, should not be "in open and public possession" of the property (c). This relaxation of the rule of the Ordinance (which was effected by subsequent statutes) contrasts somewhat strangely with the proviso above mentioned. The latter seems to aim at a stringency unknown to the systems whence this portion of our law was borrowed; the former exempts from the rule of publicity a large category, perhaps a majority, of the cases of alienations of real estate. The purchaser who

(a) Cowp. Rep. 712; Cheval vs. Nicholls, 1 Str. 664; Beatniff vs. Smith, 1 Eq. Cases Abr., 357, pl. 11; Blades vs. Blades, 1 Eq. Cases Ab., 358, pl 12; 3 Sugden on Vendors and Purch., 222.

(b) Code of Louisiana, Art. 3315.

(c) 7 Vict., cap. 22, sec. 9, and 8 Vict., cap. 27, sec. 7.

enters upon, and occupies the house or land he has bought, need not register; so long as he remains in possession he can defy all subsequent hypothecary creditors or purchasers, even under registered titles.

56. Where, however, the first purchaser has neglected to register, or to take open and public possession of his property, and a subsequent *bonâ fide* purchaser (or hypothecary creditor) for valuable consideration has registered his title—the law will give to the latter the property of (or an hypothecary right in) the immoveable estate in dispute. The former is reduced to his recourse against his vendor for the fraud. Besides his civil remedy, he may provoke a criminal prosecution for stellionat; for which the penalty pronounced by the law, is imprisonment not exceeding twelve months, and a fine not exceeding £500 (a). But his right to the property is irretrievably lost.

57. In every case of acquisition by deed, therefore, where the purchaser does not intend to occupy the lands, tenements, &c., he has acquired, at once, common prudence will dictate the registration of his title: and as what constitutes "open and public possession", may frequently be a matter of evidence and argument, it will in every case be safest to register. The delay for registration is left to the diligence of the purchaser; and those who wish to protect themselves from the creditors of their vendor, or rival purchasers, will doubtless present their deed to the Registrar as soon after its execution as possible.

58. These rules apply only to title-deeds and conveyances executed since the Ordinance came into force and effect. It is expressly provided by the first section, that "the original grant, letters patent, conveyance, or title by which lands have been granted and conveyed, and are

(a) Ord. 4 Vict., cap. 30, sec. 1.

now (i. e., on 31st December, 1841,) held *en fief, à titre de cens, en franc aleu*, or in free and common soccage" do not require to be registered. This provision has always been strictly carried out: proprietary rights of whatever nature, which were in existence on 31st December 1841, enjoy the same validity, though unregistered, as they would have enjoyed had the Ordinance never been passed.

SECTION II.

OF THE ALIENATION OF LANDS IN FREE AND COMMON SOCCAGE.

59. *The Registry Ordinance did more than establish Registry Offices.*
60. *Introduction of English Law of Tenures into this Province.*
61. *Definition of a bargain and sale.*
62. *Deeds of bargain and sale to convey not only the use but the estate and freehold.*
63. *The words "grant, bargain, and sell" to imply covenants for title.*
64. *Deeds of bargain and sale must be registered.*
65. *Copies of deeds before witnesses, certified by the Registrar, are evidence of the originals in Courts of Justice.*

59. The Registry Ordinance, as its somewhat lengthy title imports, has done something more than establish Offices of Registry. It has "altered and improved the law, "in certain particulars, in relation to the alienation and "hypothecation of real estates, and the rights and interest "acquired therein." The laws governing the alienation of lands held in free and common soccage, have thus undergone considerable modification.

60. The Quebec Act, while declaring as a general rule that the old laws and customs of Canada should govern in controversies respecting property, made an express reservation of those lands which had been, or which

might be thereafter granted in free and common soccage (a). A few years afterwards, this exception was confirmed by the 31 Geo. III, which enacted that lands granted by the Crown in Lower Canada, might, if the grantees desired it, be granted in free and common soccage (b); and lands so held, as was subsequently explained by the Imperial Act, 6 Geo. IV, were subject to the English laws governing lands held in free and common soccage, in respect of alienations, descent, and dower (c). The next, and last statutory enactment on the subject, which is known as Bowen's Act, (d) authorised proprietors of lands held in free and common soccage, to grant, bargain, sell, enfeoff, alienate, give, exchange, dispose of, devise, or convey such lands, either according to the laws of England, or according to the laws and customs of this Province. (e)

61. One of the most usual modes of conveyance according to the laws of England, is by Bargain and Sale. A bargain and sale, according to Blackstone, is "a kind "of real contract, whereby the bargainor, for some pecu- "niary consideration, bargains and sells, that is, ***contracts "to convey*** the land to the bargainee, and becomes by "such bargain, a trustee for, or seized to the use of the

(a) 14 Geo. III, cap. 83, s. 8, 9.

(b) 31 Geo. III, cap. 31, s. 43.

(c) 6 Geo. IV, cap. 59, sect. 8.

(d) 9 Geo. IV., cap. 77, sect. 2. Doubts have been entertained whether this Act is in force or not; it having been reserved for His Majesty's Assent, and that assent having been granted nearly two months after the expiration of the two years fixed, by 31 Geo. III, as the latest period at which the royal assent can be validly given. A special Act of the Imperial Legislature was passed to cure the defect. Some judges have expressed a conviction that the Act was not law (Vanfelson, J. in Stuart vs. Bowman, S. C. Montreal, 26 March, 1851); but the Courts have generally held a different doctrine. (Boston vs. Classon, S. C. Montreal, 20th October, 1851, &c.)

(e) See, on the Tenure in free and common soccage, Mr. Robert Abraham's little work on the tenure en franc aleu roturier, a learned and ingenious performance, which ought to be in every lawyer's library.

" bargainee" (a). The conveyance was completed in England by the operation of the Statute of Uses (b), which, in such contracts, in the technical language of the Courts, " executed the use," and made the *cestuy que use*, or bargainee, complete owner of the lands both at law and equity (c).

62. Even if it had been held that the Statute of Uses, with its attendant cumbrous machinery, was part of the law of Canada, so as to complete the otherwise inchoate Bargain and Sale: the doctrine of uses was very foreign to the simplicity of our jurisprudence, and repugnant to the notions of a majority of the landholders in the Province. To obviate the necessity of a recourse to it, the Ordinance enacts, (d) that "any indenture, deed or writ-" ting of bargain and sale, made, sealed and delivered " before two witnesses, or made and executed before a " notary and two witnesses, or two notaries, whereby " the intention of the bargainor to sell, and of the bar-" gainee to purchase an estate of inheritance, or freehold, " in any lands and premises, held in free and common " soccage, shall be made manifest, shall be a good and " valid conveyance for transferring, passing and assuring " to the bargainee, his heirs and assigns, not only the use " of and in the same, but also the lawful seizin, estate of " inheritance or freehold, and possession of the bargainor " of, and in such lands, &c., without any livery of seizin, " attornment (e), or other formality whatsoever." And in

(a) Blackstone, Comm., II, 338.

(b) 27 Hen. VIII., cap 10.

(c) Blackstone, Comm., II, 333.

(d) Ord. 4 Viet., c. 30, s. 38.

(e) Livery of seizin was a symbolical delivery of the immoveable sold from the vendor to the purchaser. Blackst. II., 315. It does not appear that livery of seizin was required in Bargains and Sales, to vest the property in the purchaser: See Blackst., II., 337; 1, Saunders on uses, pp. 128, 129; II Sand., 44; IV. Taunt., 20; Willes, 682; Shep. Prec. of Convg.,

order to enlarge the narrow rules of English conveyancing, it was added, that such bargains and sales should be susceptible of any covenants which might, under the English law, be introduced into a conveyance by feoffment, or a lease and release (a).

63. According to the English rules, a Bargain and Sale only conveys to the bargainee the estate which the bargain or possessed, and could lawfully convey at the time it was executed (b). To borrow the phraseology of the English conveyancers, a Bargain and Sale cannot effect a discontinuance of an estate tail (c), or destroy a contingent remainder dependent on a particular estate (d): a purchaser in fee, by Bargain and Sale, from a tenant in tail, only takes therefore a base fee, determinable on the death of the tenant in tail (e): and a purchaser in fee, by the same deed, from a tenant for life, with a contingent remainder dependent thereon, only takes an estate for life (f).

With a view to prevent the frauds to which this rule occasionally gave rise, and to obviate the necessity of lengthy covenants in deeds of Bargain and Sale, a suggestion thrown out by Sir Matthew Hale in his pamphlet, was acted upon in 6 Anne, cap. 35, which declared that in all

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283; "Indeed," says an old writer, "if a man by deed bargains and sells land to A and his heirs, and livery be made, it is a feoffment." 2 Roll., Abr. 2. An attornment was the consent of the vassal to the grant of the seigniory, or a rent, or of the donee in tail, or tenant for life or years, to a grant of reversion or remainder made to another. See Co Litt. It does not appear that attornments were necessary to perfect Bargains and Sales, 1 T. R., 384 386: II. Saund on uses, 44, &c.: and before the conquest the c Stat. 4 and 5 Anne, c. 15, s. 9, 10, had rendered them absolete and unnecessary in England.

(a) Ord. 4 Viet., cap. 30, s. 38.
(b) Burton's Conveyancing, IV, 278.
(c) Co. Litt. 332, 6. Gilb. on uses, 297.
(d) Gilb. on uses, 140: Fearne, 472.
(e) Markill vs. Clarke, 2 Salk, 619.
(f) Gilb. on uses, 140.

deeds of bargain and sale of lands within the East and West Ridings of York, the words: "Grant, Bargain, and Sell" should imply Covenants for title. Our Ordinance has adopted this rule. It says that "in all indentures, "deeds, or writings of bargain and sale," (made after 31st December 1841) "whereby an estate of inheritance "in fee simple is limited to the bargainee and his heirs, "the words 'grant, bargain and sell' shall import and be "construed and adjudged, in all Courts of Judicature, to "be express covenants to the bargainee, his heirs and "assigns, from the bargainor for himself, his heirs, &c., "that the bargainor, notwithstanding any act done by "him, was at the time of the execution of such indenture, "deed or writing, seized of the hereditaments or premises "thereby granted, bargained, and sold, as of an indefea-"sible estate in fee simple, free from all encumbrances "(rents and services due to the lord of the fee only ex-"cepted) and for quiet enjoyment thereof, against the "bargainor, his heirs, and assigns, and all claiming "under him, and also for further assurance thereof, to be "made by the bargainor, his heirs and assigns, and all "claiming under him; unless the same shall be restrained "and limited, by express particular words, contained in "such indenture, deed, or writing; and the bargainee, "his heirs, &c., shall and may, in any action to be brought, "assign a breach or breaches thereupon, as they might "do, in case such covenants were expressly inserted in "such bargain and sale." (a)

64. Deeds of bargain and sale, it is hardly necessary to remark, must be registered in like manner, and with the like effect, as deeds of alienation of property held under the French tenures.

65. Another inconvenience of the system of conveying land by deeds before witnesses, was also removed by the

(a) Ord. 4 Vict., cap. 30, sect. 39.

Ordinance. It was enacted that all "deeds, conveyances, wills, and writings executed before witnesses" (whether prior or posterior to 31st December, 1841) which constituted the title of any party to real property in this Province, might be registered at full length, in separate books, by the Registrar: and copies from these books, duly authenticated by the Registrar, were declared to be good and sufficient evidence of the originals, when the latter were lost or destroyed (a).

SECTION III.

OF THE REGISTRATION OF WILLS.

66. *Wills must be registered; under pain of a relative nullity.*
67. *The party invoking the nullity need not have registered; nor need his title have been obtained bona fide.*
68. *Devisees are allowed a certain delay to register.*
69. *This delay may be further extended by a prenotation.*
70. *Rules with regard to wills made by a testator dying before 31st December, 1841.*

66. The Registry Ordinance, following the example of the English Register Acts, while it exempts titles by inheritance from registration, directs that wills and devises of real property, made by a party dying after 31st December, 1841, shall be enregistered (b).

It does not declare that unregistered wills or devises shall be absolutely null. It merely pronounces their relative nullity when opposed to subsequent purchasers, mortgagees, hypothecary or privileged creditors for valu-

(a) Ord. 4, Viet. cap. 30, sect. 40. *Aliter* with respect to Notarial deeds, though registered at full length. Dessein vs. Ross, 2 Revue, 58.

(b) Ord. 3 Viet., cap. 30, sect. 1; 6 Anne, cap. 35; 7 Anne, cap. 20; 8 Geo. II. cap. 7.

able consideration. As against these, the will which does not appear in the books of registry is inoperative and void. But the want of registration does not invalidate the claims of the devisee against the heir-at-law. (a)

67. It is not requisite that the subsequent purchaser, mortgagee, hypothecary, or privileged creditor should have registered his own title or hypothec, as in the case of other titles to real estate: though his pretensions would be void against a registered purchaser subsequent to himself, it seems that he can, nevertheless, without having registered, defeat the claims of a prior devisee who has neglected that formality. (b)

Nor does it appear that he must necessarily show good faith in the transaction: at least, such is the natural inference from the omission of the words *bona fide*, which occur in the other clauses of the section. His purchase or hypothec must, however, have been for valuable consideration. (c)

68. The delay which frequently occurs between the death of a testator and the communication of his will to the devisees, entitles the latter to a degree of favour which the law has not extended to proprietors under other titles. Devisees are allowed six months, if the Testator has died in Canada, and three years, if he has died abroad, to register his will. A registration effected within these periods has a retroactive effect to the day of his death, so as to defeat any purchases or hypothecs granted and even registered since that event. (d)

69. If "by reason of the concealment, suppression, or contesting of the will, or other inevitable difficulty, without wilful neglect, or default on the part of the devisee",

(a) Ord. 4. Vic. cap. 30. sec. 1.
(b) Ib. ib.
(c) Ib. ib.
(d) Ibid. s. 14; Imp. Stat. 6 Anne, cap. 35, sec. 14; 7 Anne, cap. 20, sec. 8, &c.

he be unable to present the will to the Registrar within these delays, he may preserve his rights by a *prénotation* (a), or provisional registration of a memorial of his pretensions, and the obstacle which prevents his taking the usual means of publishing them. If such a memorial be registered, within the above mentioned delays of six months or three years, the devisee will be permitted to register the will within six months after the removal of the obstacle, and such a registry will be "a sufficient Registry within the meaning of the ordinance." (b)

But the effect of the *prénotation* will cease after five years have elapsed from the death of the testator. After the lapse of that period, no will can be registered so as to interfere with the rights of purchasers for valuable consideration, or judgment, or hypothecary or privileged creditors, accrued after the death of the estator (c).

70. These rules apply to wills made and published by a testator dying after the 31st December, 1841. No allusion being made to wills in the 4th section of the Ordinance, (the only one, according to Chief Justice Stuart, which affected the past) (d), the nature of the right claimed, will probably be the true test to ascertain whether a devisee under a will made and published by a devisor who died before 31st December, 1841, ought to register or not. If he claim a sum of money secured by a hypothec under the will, he would seem to fall under the same rule as other hypothecary creditors, and his will must have been registered before 1st November, 1844, to be valid against other creditors who have registered

(a) See Supra. chap. I, Sect. 3, No. 38.

(b) Ord. 4 Viet. cap. 30, sec. 14; Imp. Act. 6 Anne, cap. 35, sec. 15; and 7 Ann, cap. 20, sec. 9.

(c) Ib. ib.

(d) Sir James Stuart, Ch. J., in McLaughlin vs. Bradbury, reported in 3 Revue 340.

before him (a). If he claim a proprietary right, it would seem that he is under no obligation to register.

SECTION IV.

OF THE REGISTRATION OF DEEDS OF GIFT.

71. *The Roman and French Laws required donations to be recorded.*
72. *Substitution of the Registers for the Greffe des Insinuations.*
73. *Where deeds of gift must be enregistered.*
74. *Suggestion to donees: query, as to the retroactive effect of registration.*

71. At the earliest periods to which we can trace our law, publicity was an essential element in deeds of gift. Constantine first required that all donations of property worth more than 200 solidi, should be entered in a public register. This rule was slightly modified by Justinian. "And whereas the ancient laws," says the Institute, "required that all donations wherein the value of the "thing given, exceeded 200 solidi, should be insinuated, "our *constitutio* extended the exemption to donations of "500 solidi, to which it gave full validity without insi- "nuation." (b) The French Ordinances contain similar dispositions. That of Villars Cotterets of 1539, required that all donations should be *enregistrées et insinuées*, under pain of nullity. (c) This was confirmed by a declaration of Henry II, in February 1549, and further explained by the Ordinance of Moulins, which fixed four months, when the parties resided in France, and six months, when they lived abroad, as the periods within

(a) See Post, Ch. 3, Sect. 3. Duchesnay vs. Bédard, I L. C. Rap. 435.
(b) Inst. De Don. II. 7. 2.
(c) Art. 132; Poth., Don. Entre Vifs, Sect. 2, Art. 3, § 1.

which donations were to be *insinuées*. (a) These delays were computed from the execution of the deed of donation, if it was accepted at the time : if the donee accepted subsequently by a separate *acte*, the delay to insinuate began to run from the date of the acceptation. (b) When *insinuées* within this delay, the insinuation had a retroactive effect, to the date of the donation. (c) After the lapse of the four (or six) months, if the donor were still living, the donee might register at any time, and the donation became operative against third parties from the date of its insinuation. (d) After the death of the donor, the donee could no longer validly insinuate his deed. (e) These rules applied to all donations of immoveables, and to donations of moveables worth 1000 livres and over, where delivery was not made immediately. (f)

72. The Registry Ordinance made no radical change in the law. It merely substituted the Books of the Registrar for the *Greffe des insinuations*, in the cases where the French Ordinances directed insinuation to be made, and declared that a registry of a deed of gift intervivos of real property, in the former, should be clothed with all the legal effects of an insinuation under the old law (g). Whether from error or design, this section of the Ordinance was so worded as only to apply to donations of real property made after its date (h). A recent statute (i) has extended its operation to deeds of gift of moveables which would have required insinuation under the French

(a) Art. 58; Poth. Ib. § 3.
(b) Poth., ib. ib.
(c) Ib. ib.
(d) Ord. Art 26; Ferrière on Paris, Art. 284.
(e) Ord. Art. 26.
(f) Ord. Arts. 20, 22; Poth. Don. entre vifs, Sect. 2. Art. 3, § 1.
(g) Ord. 4 Vict., cap. 30, s. 33.
(h) *Ex parte* Ordinance and Pemberton and Parent, Oppts., 2 Revue, 200.
(i) 14 et 15 Vict., cap. 93, s. 4.

law; and of immoveables, whether executed before or after the Ordinance came into force and effect: with a reservation, however, of rights acquired by third parties at the time of the passing of the Act, viz., 30th August, 1851 (a).

73. Deeds of gift of real property must be registered in the Registry Office of the District, County, or Division wherein the immoveables are situate. If they are scattered, and lie in several Districts, Counties or Divisions, a registry must be made in each, but each registry will be separately valid for the lands situate within the limits of the office, whether the donation have been regularly registered in the other offices, or not. Deeds of gift of moveables must be registered in the Registry Office of the District, County, or Division wherein the donor resides (b).

74. As the want of registration is so fatal a defect in a deed of gift that it can be validly urged by any creditor, by the heir of the donor, or by any one who has an interest in having the donation annulled with the single exception of the donor himself (c), it is hardly necessary to suggest to donees the propriety of registering within the shortest possible delay. When the Ordinance says that a registry under its provisions "shall have the same force and effect (in respect of the property given) to all intents and purposes whatsoever, as a registration at full length (on insinuation) under the old laws, would have had" (d), it may be a question whether it was meant to give to the former formality, the same retroactive effect as the latter

(a) By a typographical error in the printing of the statute 14 and 15 Vict. cap. 95, the word "these" in the proviso at the end of the 14th section has been substituted for "third," thus destroying the sense of the clause. The Legislature will propably remedy the error without delay. See Archambault vs. Roy, 2 L. C. Rep. 25.

(b) 14 and 15 Vict., cap. 98, sec. 4.

(c) Ord. des Donations, Art. 27; Poth., Don. ent. vifs, Sect. 2, Art. 3, § 4.

(d) Ord. 4 Vict., cap. 30, sec. 33.

enjoyed. If such was the intention of its framer, a registry made within four months after the acceptance of the gift, when the parties reside in Canada, and within six months when they reside abroad, would operate from the day of the acceptance of the donation. These delays past, the general rule would apply; the donee's rank would depend on the date of his registration. If the words above mentioned do not clothe registration with the same retroactive effect as insinuation formerly had, donations are subject to the same rule as all other deeds.

CHAPTER III.

OF THE REGISTRATION OF HYPOTHECS.

75. Definition, and various kinds of hypothecs.

75. A hypothec is a real right possessed by a creditor in the immoveable property of his debtor, by virtue of which he is preferred on the proceeds of sale of such property to other creditors (a). That right is, of its nature, indivisible; and follows the property into the hands of subsequent proprietors (b).

Hypothecs are either legal, judicial, or conventional (c).

Legal hypothecs are those which are created by the law alone.

Judicial hypothecs are those which result from judgments or judicial proceedings.

Conventional hypothecs are those which are granted by contracts or agreements (d).

The Ordinance requires that all hypothecs created after it came into force shall be enregistered, to be operative against subsequent *bonâ fide* registered purchasers, mortgagees, privileged or hypothecary creditors, or encumbrancers, for or upon valuable consideration (e).

(a) Poth., Hyp., Art. Prel.; Ib., Cout. d'Orl., Tit. XX, No. 2.; Domat, Liv. 3, Tit. 1; Louisiana, 3245; Prussia, 436, 439; L'hypothèque est un droit réel sur les immeubles affectés à l'acquittement d'une obligation, C. C. 2114. But see Troplong, Priv. and Hyp., No. 386.

(b) C. C. 2114; Domat, Liv. 3, Tit. 1, Sect. 1, Sect. 18; Poth., Hyp., ch. 2; L. 65, ff. de evict.

(c) C. C. 2116; Domat, Liv. 3, Tit. 1, Sect. 2, Sect. 4; Poth., Hyp., Art Prél.

(d) Poth. and Domat, loc. cit.

(e) Ord. 4 Vict., cap. 30, Sect. 1.

SECTION I.

OF LEGAL HYPOTHECS.

ARTICLE I.

76. *Of the legal hypothecs of the Roman and Old French Law.*
77. *Of those recognised by the Code Civil.*
78. *The three legal hypothecs of the Ordinance.*
79. *Exception.*

76. The legal hypothecs of the Roman law were very numerous. One author has counted as many as twenty-six (a). Of these many were adopted in France. Pothier enumerates several of them; and classes under the same head claims which we style privileges, as the vendor, copartitioner, &c. (b).

77. The principles of publicity and speciality on which the Code Civil was based, reduced these legal hypothecs to three, viz: That of the wife; that of minors and interdicts, and that of the Crown, *communes*, and public institutions, on the property of *comptables* and administrators (c). But though the Code specifies these as "the rights and claims to which a legal hypothec is attached," it does not state *totidem verbis*, that no other legal hypothec shall exist. On the contrary, the 1017th. Article gives legatees a legal hypothec on the property of the heirs for the payment of their legacies (d) And the Code of Commerce gives the assignees of a bankrupt a right in his

(a) Neguzantius, quoted by Basnage, ch. 6, No. 1.

(b) Poth., Hyp., ch. 1, Sect. 1, Art. 3; Ib., Cout. d'Orl., Tit. XX, Nos. 18, 19. See also Domat, Liv. 3, Tit. 1, Sec. 5 seq.

(c) C. C. 2121.

(d) Troplong, P. and H., No. 432 ter; 1 Tarrible, No. 95; Dalloz, Ch. 2, Sect. 2, Art. 3, No. 7; Proudhon, de l'usufruit, Nos. 120, 887.—Per contra V Toullier, No. 567.

property more nearly resembling a legal hypothec than any thing else (a).

78. Our Ordinance has imitated the Code Civil in restricting the number of legal hypothecs. But its language is more unequivocal and precise. "No legal or tacit hypothec" says the 29th section, "shall for any cause "whatsoever be constituted or subsist on lands, &c. in "this Province, except for the causes, and in the cases "following:" and then follows the enumeration of the three legal hypothecs of our law, viz: 1st. that of the wife, 2nd. that of minors and interdicts, and 3rd, that of the Crown.

Thus, neither public institutions, nor legatees, nor husbands on the property of their wives, nor tutors on that of their wards, (all of whom formerly enjoyed hypothecary rights) (b), nor any other class of creditors, but the three mentioned above and the following exception, are entitled to-day to a legal hypothec.

79. An exception to the general rule has been introduced by a recent statute, in favour of school assessments, which, if not paid, are "a special charge bearing ***hypothèque*** on all the immoveable property of the debtor," not requiring registration to preserve it (c).

ARTICLE II.

OF THE LEGAL HYPOTHEC OF MARRIED WOMEN.

80. *Reasons for granting a legal hypothec to married women.*
81. *Their rights in the Roman and old French Law.*
82. *Claims secured by the legal hypothec under the* Ordinance: *contrast with foreign systems.*

(a) Art. 500.

(b) Poth., Hyp., Ch. 1, Sect. 1, Art. 3; II Pigeau, 53; D'Hérieourt, Ch. XI, Sect. 2, Nos. 19, et seq.

(c) 9 Vict., cap. 27, Sect. 36.

83. *The hypothec of the wife for antenuptial dotal property, conventions matrimoniales &c., is conventional.*
84. *As such it must be special, and for a sum certain.*
85. *Period from which the legal hypothec is accounted: property on which it attaches.*
86. *It only exists in cases where property has been given to or inherited by the wife as a propre to her.*
87. *Query: Does it exist independently of registration? Reasons for the affirmative.*
88. *Reasons for the negative.*
89. *Suggestions in case the latter sentiment should prevail.*
90. *The hypothec for remploi de propres.*
91. *No hypothec exists for indemnity for debts.*
92. *The husband must register the wife's hypothecs: penalties and disabilities in case of neglect.*
93. *Registry may be effected by other parties.*
94. *Women married without a contract since 31st December, 1841, need not register their claims for customary dower.*
95. *Alterations in the law of dower; release of dower.*
96. *Query: Does the legal hypothec of wives married before 31 December 1841, require to be registered? Case in which the negative was held.*
97. *Case in which the affirmative was held.*
98. *The question turns on the meaning of the 4th section.*
99. *Hypothec of the wife married before 31st Dec., 1841, for conventions matrimoniales, &c., must be registered: proprietary rights.*

80. The policy of maintaining marital authority, without permitting the position of dependence in which the wife was placed to prejudice her rights, dictated those dispositions of the old law, which exempted married women from the obligation of taking the same precautionary measures for securing their rights, as other creditors were required to adopt. Where the latter were obliged to exact a voluntary pledge from their debtor, the law intervened in favour of the former, and gave them a tacit lien on all their husband's property.

81. Under the early Roman Law, the rights of married women on their husbands' estate appear to have been secured by a personal privilege, which, though it placed them in a higher rank than mere chirographary creditors,

could not take precedence of a mortgage. Extending a further degree of protection to the sex, Justinian gave them a tacit *privileged hypothec* on all the property of their husbands, ranking above all the creditors of the latter, including those whose hypothec was prior to the celebration of the marriage. (a) The iniquity of this law was the means of its rejection by the French Parliaments. In the jurisdiction of that of Paris, it was held that the wife had a tacit hypothec for her *dot*, but from the date of the marriage contract only. (b)

82. There is no portion of the Ordinance which is involved in more difficulty, than the sections which refer to married women.

The twenty-ninth section states, that after 31st December 1841, "no legal or tacit hypothec shall, for any cause "whatsoever, be constituted or subsist on lands, &c.,. ex- "cept.... upon the lands, &c. of married men, to and in "respect of their wives, for securing the restitution and "payment of all dotal sums of money, claims, and "demands which they may have upon their husbands, "for or by reason of any succession or inheritance, which "may devolve upon, and accrue to such married women, "and of any donation which may be made to them, dur- "ing the continuance of their marriage, *which hypothec* "shall be accounted from the respective periods at which "such succession or inheritance shall so devolve or accrue, "or such donation shall receive execution, &c., &c."

Thus, the legal hypothec of married women is restricted to their claims resulting from post nuptial acquisitions, which are supposed to have fallen into the hands of their husbands; and can no longer be exercised for the other portions of their dot. This enactment has at least the

(a) Cod., Lib. V, Tit. 13. De rei. ux. act.

(b) Poth., Hyp., Ch. 1, Sect. 1, Art. 3; Ferrière on Paris, 232; Domat, Liv. 3, Tit. 1, Sect. 1, No. 3; Basnage, Ch. XII.

the merit of originality. The Code Civil, the Codes of Naples, of Piedmont, and of Louisiana, have preserved the wife's legal hypothec for all those claims which collectively constitute her *dot* (a): viz., her claim for the restitution of the dotal property she possessed at the time of the marriage, that for the price of her propre estate sold during her coverture, (remploi de propres), and that for her indemnity for debts contracted by her on behalf of her husband. The three former grant the same legal hypothec to her claim for her "conventions matrimoniales," such as donations made to her, and rentes constituted in her favour by her husband, preciput, conventional or prefix dower, &c. (b)

The language in which the above section of the Ordinance is couched, the last clause especially, is conclusive against any attempt to give a similar latitude to the legal hypothec of the wife in our system. To her claims for dotal sums of money, given to, or inherited by her during the marriage, alone, has the Ordinance attached a legal hypothec.

83. Not that the other claims which she has against her husband's estate are chirographary. There is nothing in the law which could be construed to deprive her claims for the restitution of the dotal property she possessed at

(a) For the extensive signification attached in France to the word *Dot*, see I Bourjon, p. 667, 7e. part de la Comm. ch. 2, sect. 9, nos. 114, et s.; Lebrun, Comm., Liv. 3, ch. 2, sect. 3, Dist. 6, No. 29, p. 523; Merlin Repr., vo. Dot, and Troplong, Nos. 574, 585. Bourjon did not consider that the wife's indemnity for her propre estate, when sold voluntarily, formed part of her *dot*; but restricted the privilege to that for necessary alienations (remploi de propres forcément aliénés). But this jurisprudence, if it ever obtained in the Chatelet, was absolete when Pothier wrote: the courts do not seem to have made any distinction between voluntary and forced alienations. See Poth., Comm., No. 611; Ferriere, D. D., Vo. Remploi de propres.

(b) C. C., 2121, 2135; Code of Two Sicilies, 2007, 2008; Code of Sardinia, 2169, 2170, 2171; Code of Louisiana, 3287.

the time of the marriage, and for her *conventions matrimoniales*, of their hypothecary character. On the contrary, special provision is made for their registration. The hypothecs therefore continue to exist; but instead of being as they were in the old law, and are in all modern cognate systems, legal hypothecs, they are merely conventional, and must be expressly stipulated in the contract of marriage.

84. Are they, then, subject to the same rules as other conventional hypothecs? Must they be special, and for a certain sum?

However startling such a statement may appear, it is impossible to sustain a reply in the negative. The Ordinance says, that from and after 31st December 1841, "*no* "*general hypothec* shall be stipulated in, or constituted "by, or *result from* any deed, *contract* or obligation in "writing whatsoever, to be thenceforward made and "entered into; and *no conventional hypothec*, charge, or "encumbrance on lands, tenements, etc., shall, from and "after the day last aforesaid, be constituted, or acquired, "in or by virtue of any deed, contract, or obligation in "writing, which shall be executed or made after that "day, before a notary and witnesses, or before notaries, "or before any Court of Justice, or Judge, or otherwise "however, unless the lands, tenements, etc., intended or "alleged to be hypothecated, charged, or encumbered, by "such deed, *contract*, or obligation in writing, or such ac-"knowledgment thereof (*sic*), or by which any such hypo-"thec may be claimed, be therein specially described, "&c., &c." (a).

No exception is made to this rule. The common meaning of words will not tolerate such an interpretation of the clause as would exclude contracts of marriage from its operation. It cannot be pretended that a con-

(a) Ord. 4 Vic., cap. 30, s. 28.

tract of marriage is not a "contract": nor can we, in the face of the 29th section, class the hypothec claimed by the wife in virtue of her contract of marriage otherwise than as a conventional hypothec.

An additional argument in support of the belief, that the framer of the Ordinance intended to subject marriage contracts to the same rules as other deeds creating conventional hypothecs, may be extracted from the means provided for reducing the wife's claim to a sum certain. Her hypothec for indemnity for debts contracted on behalf of her husband, was abolished by the clause which prohibits her incurring any individual liability with him. That for the price of her *propre* estate sold during the marriage, was also taken away by the clause which prescribed an examination in private before a Judge, &c. These two claims disposed of, those which remained—her claims for restitution of her antenuptial dotal property, for settlements made on her by her husband, for *préciput*, conventional dower, &c.,—could, without the slightest difficulty, be set down in the contract at a fixed sum of money.

There is no clause in the Ordinance which could serve as the basis of an exception from the general rule, in favour of the wife's hypothec for these claims. On the contrary, if it be held that it is not governed by the section last cited, then we must assert that in spite of that section a general hypothec *can* be constituted by a contract, and a conventional hypothec *can* be acquired in virtue of a contract, without any description of the lands hypothecated.

Such an interpretation would be equally destructive of the spirit and the letter of the law. Gravely enough do the legal and general hypothecs which are formally recognized, militate against the advantages of a system of publicity and speciality: how much more would these be

impaired, if a husband were permitted to encumber his property with general mortgages for undetermined debts due to his wife!

In fine, it seems beyond all reasonable doubt, that the intention of the framer of the Ordinance was, in cases of marriages occurring after 31st December, 1841, to rank all the hypothecary claims of the wife (except those mentioned in the 29th section) in the general class of ordinary conventional hypothecs.

Thus, where a woman about to contract marriage possesses, or receives from her relations, property or money, which is to be settled on her, the contract must stipulate, if she desires to have a hypothecary claim on her husband's estate for its restitution, that the husband specially mortgages in her favour, for a fixed sum, some certain specific property, which must be described in the contract. So, where her husband settles a sum of money, a life rent, a preciput, a préfix dower, or other pecuniary advantage upon her, he must secure them by a like special hypothec, if he means her to enjoy a preference on his estate over his other creditors for their recovery. In short, all the rules which are hereafter (ch. 4, sec. 3) prescribed for voluntary hypothecs apply to these claims. The contract of marriage must be registered, and the hypothecs resulting from its covenants will rank, against bona fide registered purchasers or hypothecary creditors for valuable consideration, from the date of such registry.

85. The legal hypothec of married women, resulting from post-nuptial acquisitions is, of course, very different in its character: no express stipulation is required to give it birth: it derives its existence from the law alone. It dates, as we are told in the 29th section, from the moment when the succession devolves, that is to say, from the death of the defunct (a), or from the moment the

(a) Le mort saisit le vif, Paris, 318.

legacy or donation is accepted (a). From these periods, all the property possessed or acquired by the husband, whether as *conquets* or *propres*, is tacitly hypothecated in favour of the wife, for the restitution of the sums of money or moveables so given to, or inherited by her, and which are presumed to have fallen into his hands (b). It matters not whether such property be or be not in the possession of the husband or his heirs, when the wife is entitled to institute her demand: possession for a moment of time subjects them to the legal hypothec. It has even been held that, where an immoveable owned by the husband is exchanged for another, the legal hypothec attaches upon both (c). It is clear, however, that she cannot exercise her hypothec on property which has been sold by her husband, without renouncing the community; for, until she does so, she is equally bound with him to guarantee the purchaser's title (d). But the fact of her having been a party to the deed of alienation has been held to be no bar to her hypothecary claim: for it has been decided that, as she can incur no individual liability with her husband, she gets rid of whatever obligation she had thus contracted, by renouncing the community, and is free, afterwards, to institute her demand against the *tiers detenteur* (e).

(a) Persil, Rég., Hyp. I., 487, sur l'art., 2135, and other Commentators.

(b) Poth., Comm., No. 610; Ferrière on Paris, 232; Bourjon, 7e Part. de la Comm. chap. 2, Nos. 71, 136; Lebrun, Comm., Liv. 7, chap. 2, sec. 2; Dist. 5, Nos. 88, et seq.; Renusson Comm., part. 2, chap, 3, Nos. 47, et seq.; Rousseau de la Combe, Vo., Hypothèque. For a refutation of Pothier's theory of mandat tacit, &c., see xii. Toullier, No. 219, et seq.; xiii. Ib. Nos. 262, et seq., 268.

(c) Domat, Liv. 3, tit. 1, sec. 1, No. 12; Troplong, P. et H., No. 434 bis; Arret de la Cour de Cassation, du 9 Nov., 1815.

(d) Troplong, P. et H., No. 433 ter.; Persil, Questions, chap. 5, § 4; 8 Delvincourt, p., 97; Duranton, No. 329.

(e) — vs. Brosseau and Daigneau, Oppt., 2106 of 1846, Q. B. Montreal. The accuracy of this decision may perhaps be questioned. A married woman

It is hardly necessary to remark that the hypothecary rights of married women are always subordinate to, and dependent on the proprietary rights of their husbands: where the latter are conditional, the former must be conditional also. Thus, a married woman has no hypothec upon the real property of a partnership in which her husband is a partner, until it is dissolved, and the share of each partner definitely fixed and made over to him (a).

86. Nor will it be requisite to do more than mention the obvious principle, that the tacit hypothec preserved by the Ordinance to the wife for post-nuptial acquisitions, only applies to the case where they are given to, or inherited by her, as her sole property. If they are acquired in such a manner as to fall into the community, of course no hypothec will be created.

87. It is a question whether this legal hypothec exists independently of registration. Those who contend that it need not be registered, argue that the words of the 29th section, which fix a period from which it shall rank, have done away with the necessity of registration; that the neglect to register cannot involve any loss of rank, as the latter is thus expressly settled. They further assert that it is, in most instances, physically impossible to register this legal hypothec. The registry of the deed of gift, or will, would afford no evidence of the hypothec; that of the certificate of marriage would be equally nugatory; and in some cases, as where the wife claimed as heiress of a person who died intestate, there would be no document at all to register. A receipt from the husband would be obviously unworthy of faith, as liable to suspicion on the ground of fraud. The Ordinance, contemplating no other mode of registration than that by memorial, required

may certainly renounce her hypothec. (Troplong, Nos. 596, 597) Query, whether her being a party to the deed of alienation does not comprehend a tacit renunciation? See Domat, liv. 3, tit. 1, sect. 7, No. 12, et seq.

(a) 4 Pardessus, Droit Commercial; Arrêts in Dalloz.

that with the memorial of a hypothec, the deed or document on which it was founded should be presented to the Registrar: what deed or document answering the purpose, could be tendered in this case? If none, registration is an impossibility.

88. On the other hand, reference is made to the first section which requires in plain language that "all ... "hypothecary rights, and claims, and encumbrances, from "whatever cause they may result, and ***whether produced "by mere operation of law*** or otherwise" shall be registered, to show that it was not intended to exempt legal hypothecs from the formality. And this view is corroborated by the 21st section, which enjoins on "married men "to cause and procure to be registered without delay a "memorial of ***all and every the hypothecs*** and encum- "brances to which their lands, &., shall become or be "subject or liable to in respect of their wives;" and imposes a penalty upon them, in case their neglect in this respect should be the means of permitting a subsequent creditor to rank before their wives. Again, it is urged that had the framer of the Ordinance intended to exempt the legal hypothec of the wife from registration, language similar to that used in referring to leases, and seigniorial rights and privileges would have been employed (a).

It is not impossible to believe that the clause which fixes the period from which the legal hypothec shall be accounted, was merely intended to derogate from the old common law, which made it rank from the date of the marriage, and that the vitality thus given to it is subject in all cases to its registration in due course; whereas it is doing some violence to the letter of the law, to suppose that when married men are told to register ***all*** the hypothecs of their wives, they were only meant to register ***some***, while others were kept secret. If the framer of the

(a) Ord. 4 Vict. cap. 30, sect. 2, 17.

Ordinance intended this hypothec to rank independently of registration, it is to be regretted that, while the Code Civil, and Code of Louisiana served as originals for the many of the main doctrines of his bill, he should have omitted those most important words which occur in both: *L'hypothèque existe, indépendamment de toute inscription, en faveur de la femme mariée*, &c.

89. If, on the contrary, the belief should obtain that, as against subsequent *bonâ fide* registered purchasers or mortgagees for valuable consideration, the legal hypothec of women married after 31st December 1841, was intended to rank from the date of its registration, husbands whose wives receive sums of money or moveables by gift, or inheritance, to remain their separate property, would do well to effect a registration of the hypothec resulting therefrom, following the rules of the Ordinance as far as they are applicable. Prudence might suggest in this case the registry of the deed of gift, or will, where such exist, the marriage certificate, and the husband's receipt for the money or property, which ought to contain some notice of the hypothec. In cases of succession, a document to which the coheirs of the wife were parties, and which established the fact of the delivery of the money or property to the husband, would probably rebut any suspicion of fraud, and might possibly be advantageously registered.

90. Allusion has been made above to the legal hypothec formerly enjoyed by married women, for the price of their *propre* estate, sold during the marriage. This was taken away by a clause of the Ordinance, which provided that if a married woman, whose *propre* estate was about to be disposed of, acknowledged in private before a Judge, that she was a consenting party to the transaction, she should have no claim on her husband for indemnity by reason of such alienation (a). However desirable it may have been

(a) Ord. 4 Vict. Cap. 30, s. 34.

in theory to get rid of such claims as that for *remploi de propres*, there is little doubt that the means employed were not calculated to attain their end; and it is not surprising that the clause was repealed in 1849, and the law was declared to revive as though it had never been enacted (a). On referring therefore to the old system, we find that married women have a legal hypothec for the price of their *propre* estate sold during their coverture (b). It seems that this class of claims falls under the same rules as those for post-nuptial acquisitions, and that it is, like all other hypothecs, subject to registration, the documents to be registered being probably the deed of alienation, and the receipt of the husband for the price of the property sold.

91. The wife's hypothec for indemnity for obligations contracted on behalf of her husband, has been more effectually destroyed. The Ordinance declared that after 31st December, 1841, it should not be "lawful for a married woman to become security, or responsible, or incur "any liability whatever, in any other capacity, or otherwise, than as *commune en biens* with her husband for "the debts, contracts, or obligations" contracted by her husband before, or during the marriage (c). The power to bind herself being thus taken away, her right to indemnity ceases, and the hypothec which secured it can no longer be recognised in our law. It seems to have been doubted at one time in Montreal, whether this enactment applied to women who were separated as to property from their husbands, either by their contract of marriage, or by the sentence of a Court (d). It is now, however, indisputably settled that no married woman, whe-

(a) 12 Vic. cap. 48, s. 1.

(b) See Bourjon, loc. cit. supra.

(c) Ord. 4 Vic. Cap. 30, s. 36.

(d) Vallee vs. Guilbault, 30th March, 1846; Hudon vs. Dubord, Oct., 1846. Q. B. Montreal.

ther *commune* or separated as to property, can incur any individual liability, by joining with her husband in an obligation or contract (a), unless, of course, it were for her own individual benefit.

92. All the hypothecs which women married since December 1841, are entitled to exercise on their husbands' estate, have now been passed under review. As is the case in the Code Civil, and in all other Codes in which the hypothecary rights of married women are required to be registered, particular rules respecting the mode of their registry are laid down by the Ordinance.

When the parties are of age, the duty of registering the wife's hypothecary claims devolves upon the husband. If he fail to do so, he is liable for all damages which his wife may suffer, by being postponed to subsequent creditors, or defeated by subsequent purchasers, and may be imprisoned until they are fully paid. His neglect, when followed by these consequences, is even held to amount to a fraud, for which he may be indicted. In like manner, if he "consent to, or permit any subsequent privilege or hypothec to be acquired" on his property, without disclosing in the instrument creating such privilege or hypothec, the fact that his property is already hypothecated in favour of his wife, and reserving a right of priority for her, and in consequence, such subsequent hypothec or privilege takes precedence of her claims, he is held to be guilty of fraud, and may be indicted (b). He is, moreover, disabled from bringing any action in any Court of Justice, for any cause derived from or under his contract of marriage, until it is registered (c).

(a) Bertrand vs. Saindoux, 1 Revue, 333; Moffatt vs. De Lotbiniere, July 1848, Q. B. Montreal; Gibson vs. Dodridge, 238 of 1852, and Duchesnay vs. Goudrault, 496 of 1852, Sup. Court, Quebec.

(b) 4 Vict., cap. 30, sec. 1.

(c) Ib., sec. 24.

93. When either of the parties is a minor, the Ordinance directs the father, mother, or tutor of the minor, to register the hypothecs established by the contract of marriage, and makes them jointly and severally liable in damages to the minor, in case of neglect (a).

Finally, if neither the husband, nor the father, mother, or tutor of the minor, effect the necessary registration, it may be validly made by any friend, or relation of the husband or wife, by the wife herself, or by any person whomsoever (b).

94. Questions can hardly arise as to the effect of the Ordinance on the matrimonial rights of women married after 31st December, 1841, without a contract of marriage. At common law, they are entitled to customary dower, in lieu of all hypothecary claims on their husbands' estates. Their right to customary dower is not one of those "hypothecary rights, and claims, and incumbrances," which the first section directs to be registered; nor is it (when the parties are married without a contract) claimed in virtue of any "deed, contract, instrument in writing," or other document mentioned in the Ordinance. In point of fact, it is evidenced by nothing which could be registered. It may therefore be boldly asserted, that the law did not contemplate its registration. The property on which it attaches, passes, first to the wife, then to the children, like transmissions by inheritance, quite irrespectively of the Registry Laws.

It is left to purchasers, and parties advancing money on property, to secure themselves against customary dower, by tracing the pedigree of the property to its source, and obliging the vendor or borrower to procure a release of dower from such married women, as would be entitled to demand it.

(a) Ib., sec. 25.

(b) Ib., sec. 28; 8 Vict. cap. 27, sec. 1, 2.

95. This release of dower requires a brief notice.

As the strict rules of the French law respecting the inviolability of dower, were considered by the Special Council to be rather injurious than beneficial in a young country like Canada, it was resolved by that body to strike a blow at the root of the system, by permitting married women to release their dower. This was followed up, a few years afterwards, by an Act of Parliament in the same strain. By these laws, a married woman of 21 years of age (semble whether her marriage was prior or subsequent to the Ordinance) (a), may, either in the deed of alienation of her husband's property, or, by a separate subsequent deed, relinquish her right to customary, or her hypothec for prefix dower thereon; and such relinquishment bars the action which the widow, or her children or heirs, might, at common law, have brought against the purchaser of such property for such dower, without giving the wife any claim against the husband for indemnity (b). The children of the dowager are thus entitled to claim dower, 1st, on such property as their father shall die possessed of, there being no provision in the Ordinance for the release of dower, so long as the property remains in the possession of the husband; and 2ndly, on such property as he may have alienated, but without a release or relinquishment of dower by his wife (c). It is manifestly incorrect to suppose—as some have done—that mere alienation by the husband, without a release from the wife, can discharge the dower of the children; there is no clause in the Ordinance, or in any other law, which ascribes such legal consequences to deeds of alienation.

96. The provisions of the Ordinance respecting the

(a) An unsuccessful attempt was made by Messrs. Harwood and Mondelet to restrict the privilege of releasing dower to women married after 31st December, 1841. Journ. of the Special Council, 18th December, 1840.

(b) Ord. 4 Vict. cap. 30, s. 35; 8 Vict. c. 27, s. 3, 4.

(c) 4 Vict. cap. 30, sec. 37.

hypothecs actually existing in favour of married women, at the time it came into force and effect, remain to be considered. Whether the legal hypothec of women married before 31st December, 1841, for their *dot*, can, without registration, enjoy a preference over subsequent bona fide registered mortgagees for valuable consideration, or not, is a question which has been much agitated. The affirmative was held by the late Court of Queen's Bench in the following case:—Mrs. Sheppard was married in 1809, under a contract, which stipulated that no community of property should exist between her husband and herself, and that, at his death, she should be entitled to claim from his heirs all sums of money, or moveables, which she possessed at the time of the marriage, or might afterwards acquire. At the time of the marriage, she received a dowry from her father of £200, and, during the marriage, a legacy of £1150 from a female relation. The contract of marriage and the will were registered on 7th December, 1846. Mr. Sheppard's property having been brought into Court, she claimed the usual hypothec for these sums, and was collocated accordingly. A subsequent bona fide creditor for valuable consideration, whose hypothec had been registered on 8th July, 1846, contested the report of distribution, and claimed a preference over her, in virtue of his prior registration. The Court held that he was not entitled to such preference; thus intimating that, in cases of marriages prior to 31st December 1841, the legal hypothec of the wife for dotal sums did not require to be registered to preserve its rank (a).

97. On the other hand, it appeared, in a recent case, that Mrs. Blais had possessed at the time of her marriage, in 1827, a sum of 4075 *livres*, which had been constituted a *propre* to her by the contract of marriage; and that her

(a) Ex parte Gibb, 1885 of 1847, Q. B., Quebec. Present: Stuart, Ch. J., Bowen, and Aylwin, J.

children claimed as heirs of their mother, a hypothec for the same on their father's estate. A subsequent *bonâ fide* creditor, whose hypothec had been registered before Mrs. Blais' contract of marriage, claimed a preference over her. The Court granted it, holding that in case of marriages prior to 31 Dec. 1841, the legal hypothec of the wife required to be registered to preserve its rank (a).

98. The question involved in these two contradictory decisions, turns upon the interpretation of the 4th section of the Ordinance, which is in these terms: "And be it "further ordained, and enacted, that a memorial of *all* "notarial obligations, *contracts*, *instruments in writing*, "judgments, judicial acts and proceedings, recogniz- "ances, privileged, and *hypothecary rights and claims*, "now in force, or which shall be in force on the day "when this Ordinance shall come into force and effect, "whereby *any debt or debts*, *sum or sums of money*, "goods or chattels have been *contracted*, *stipulated or* "*secured*, or have been recovered, or made, and are pay- "able, or deliverable, and whereby any lands, &c., have "been and are hypothecated, charged, or encumbered, for "the payment, satisfaction, or delivery thereof, shall be "registered within twelve months, &c." The section goes on to say that if so registered, such hypothecs shall preserve their rank: if not, they shall be "inoperative, "void, and of no effect whatever, against any subsequent "*bonâ fide* purchaser, mortgagee, &c., for valuable consi- "deration" [whose title or mortgage has been registered before them] (b).

Future Judges will decide between the opinions of the late Court of Queen's Bench, and the Superior Court.

99. Less doubt prevails respecting the hypothecs of the

(a) Girard vs. Blais, 2 L. C. Rep. 87; Present, Bowen, Ch. J., Duval, and Meredith, J.

(b) 6 Viet., c. 15, s. 1; 7 Viet., cap. 22, s. 12.

wife, who was married before 31st Dec. 1841, for her *conventions matrimoniales*. These fall clearly under the 4th section: and unless the contract of marriage was registered before 1st Nov. 1844 (the day when the delay for the registration of old hypothecs expired), it confers no hypothec to the prejudice of subsequent *bonâ fide* mortgagees, or purchasers, for valuable consideration, whose hypothecs or titles were registered before it (a). The same rule applies to prefix dower and *préciput* (b). The right to customary dower being in the nature of a usufructuary right in the wife, and a proprietary right in the children, is, like all other proprietary rights in existence before 31st Dec. 1841, exempted from registration. Thus, where a contract of marriage prior in date to that day, which had not been registered, stipulated that the wife might claim either prefix or customary dower at her option, the Prothonotary collocated her as a matter of course for the latter (c). So also, where the contract stipulated an *ameublissement général*, the claim of the wife's heirs to the proceeds of one half the immoveable property thus vested in the community, was held to be a proprietary right, not requiring registration to preserve it (d).

(a) Ex parte Gibb, Q. B. Q., 1885 of 1847; Panet vs. Larue, 2 L. C. Rep. 83.

(b) Girard vs. Blais, 2 L. C. Rep., 87; Garneau vs. Fortin, 2 L. C. Rep. 115; Carrier vs. Gauthier, S. C. Quebec, 1645 of 1851.

(c) Fraser vs. Chouinard, S. C., Quebec, 869 of 1852.

(d) Nadeau vs. Dumont, S. C., Quebec, 2195 of 1852.

ARTICLE III.

OF THE LEGAL HYPOTHEC OF MINORS AND INTERDICTS.

100. Whenever a Tutor is appointed to a minor, there is formed by the effect of law, a quasi-contract between such tutor and minor, by which the former binds himself to discharge faithfully the duties of his office, and, when his administration terminates, to render a true account to the minor, and pay over to him any sums of money which may remain in his hands.(a) A similar obligation is imposed upon those who accept the office of Curator to an interdicted person, and upon those who undertake the office of Tutor or Curator without authority (b). In order to secure the performance of these duties, the common law hypothecates all the real property of such tutor or curator, or party acting as tutor or curator, as a security to the minor or interdict, from the date of their appointment or first interference in the concerns of the minor or interdict (c).

(a) Poth., Cout. d'Orl., Tit. IX. No. 17; Ib., des Personnes, Tit. 6, sect. 4, art. 4, and sect. 5, art. 1; Domat Liv. 2, Tit. 1, sect. 3, Nos. 9, 32; Ib., Liv. 2, Tit. 2, sect. 2, No. 3; Ord. of 1667, Tit. 29, art. 1.

(b) Battur, No. 364.

(c) Same authorities.

101. This legal hypothec was confirmed by the Ordinance, and declared to exist "as a security for the due "administration of such tutors or curators, and for the "payment of all sums of money which they may be "found to owe at the close of their administration (a)."

Thus, the hypothecary action of the minor or interdict, lies not only for the balance shewn by the account rendered him, but also for the damages to which he is legally entitled in consequence of the maladministration or negligence of his Tutor or Curator (b). This hypothec extends also to all debts due to the minor or interdict by the tutor or curator at the time of his appointment; and to those which he has incurred during his administration (c).

102. It attaches on all the real property possessed by the Tutor or Curator at the time of his appointment, or acquired by him before the termination of his administration by his legal discharge (d).

103. But it may, in certain cases, be converted into a special hypothec. The Tutor or Curator may, at the time of his appointment, demand that the hypothec of the minor be made special on certain property only, and provided the relations and friends composing the *assemblée* advise, and consent to the proposal, the judge making the appointment may so order it. In this case, all the other property of the tutor is exempted from the legal hypothec (e). Moreover, in cases of tutorships and curatorships, where no such restriction was made at the time of the appointment of the Tutor or Curator, if the latter can

(a) Ord. 4 Viet., cap. 30, sect. 29; C. C., 2121.

(b) Domat, Liv. 2, Tit. 1, sect. 3, No. 36, and Liv. 2, Tit. 2, sect. 2, No. 3; Troplong, Priv. et Hyp., No. 427; XIX Duranton, No. 317; Basnage, ch. 6.

(c) Troplong, loc. cit.; I Grenier, 620; I Persil, Questions, p. 231.

(d) Ord. 4 Viet, c. 30, sect. 29; C. C. 2122; Domat, Liv. 3, Tit. 1, sect. 1, No. 6; XX Duranton, Nos. 325, 326; Persil Rég. Hyp. sur l'art. 2121, No. 25.

(e) Ord. 4 Viet., cap. 30, sect. 26; C. C. 2141.

establish, at any time afterwards, that the property affected by the general hypothec, "notoriously exceeds a suffi- "cient security for their administration," a judge may restrict it to certain specific real property. In order that he may exercise this power, it is requisite that the consent of the subrogate tutor of the minor be first obtained; and in the case of interdicts, that the restriction be made upon the advice of an assembly of relations and friends specially convened for the purpose (a). There is no provision in our law, like that of the Code Civil, which enables a legal mortgagee to compel his debtor to restrict or reduce his hypothec (b).

104. Before the Ordinance came into effect, the legal hypothec of the minor and interdict ranked from the date of the acceptance of the tutorship or curatorship, that is to say, from the day of the appointment, if the Tutor or Curator was present at the Assembly, and from the date of the notification thereof to him, if he was absent (c). And this applied as well to claims arising out of successions or donations which accrued to the minor or interdict, during the tutorship or curatorship, as to all other claims (d).

This is still the case where the Tutor or Curator was appointed before 31st December, 1841, provided the acte of appointment was registered before 1st November, 1844. If it was not registered before or upon that day, the legal hypothec of the minor or interdict will rank, against subsequent bona fide registered purchasers, or mortgagees for valuable consideration, from the date of its registry only(e).

(a) Ord. 4 Vict., cap. 30, sect. 27; C. C. 2143.

(b) C. C., 2143, 2161

(c) Basnage, des Hypoth., chap. 6; 19 Duranton, No. 14; Troplong, Priv. et Hyp., No. 428; Persil, Rég., Hyp., art., 2135, § 1, No. 2.

(d) 19 Duranton, No. 12.

(e) Ord. 4 Vict., cap. 30, sec. 4; 6 Vict., cap. 15, sec. 1; 7 Vic. cap. 22, sec. 12.

105. In like manner, where the appointment was subsequent to 31st December, 1841, the legal hypothec of the minor or interdict, when opposed to subsequent purchasers, privileged or hypothecary creditors for valuable consideration, ranks from the date of its registry (a).

106. To secure the performance of this formality, Tutors and Curators are required to register their actes of appointment without delay. If they neglect to do so, and, in consequence of such neglect, the hypothec of the minor is postponed to any subsequent registered hypothec, the law makes them liable for all damages and costs sustained by the minor or interdict, and subject to imprisonment until the amount of such damages be paid. Moreover, the Tutor or Curator who fails to register his appointment, and who allows a privilege or hypothec to be established on his property, without mentioning in the instrument creating such privilege or hypothec, that his property is already mortgaged in favour of the minor or interdict, and reserving a right of priority in favour of the minor or interdict, is held guilty of an indictable misdemeanour (b).

He is further disabled from suing in any action in any Court of Justice, in his capacity of Tutor or Curator, until his appointment has been registered (c); though he may fyle an opposition *afin d'annuller* or *de distraire* to prevent the sale of the minor's property, under a writ issued against his own (d). So essential, indeed, has the performance of this duty been held, that a Tutor or Curator, suing as such, must allege the registration of his appointment in his declaration, or his action will be dismissed (e).

(a) Ord. 4, Vic., cap. 30, sec. 1; Girard vs. Blais, 2 L. C. Rep. 87.
(b) Ord. 4 Vict., cap. 30, sect 21; see supra, No. 92.
(c) Ord. 4 Vic., cap. 30, sect. 24.
(d) Boswell vs. Murphy, S. C., Quebec, 1851.
(e) Murray vs. Gorman, 2 L. C. Rep. 1.

107. Subrogate Tutors are also required to see that the appointment of the Tutor is registered; and are liable in damages to the minor in case of neglect (a).

108. Finally, any friend of the minor or interdict, or the minor himself, or any person whosoever, may have the appointment of the Tutor or Curator enregistered (b).

ARTICLE IV.

OF THE LEGAL HYPOTHEC OF THE CROWN.

109. The third and last of the hypothecs created by the law alone, is that enjoyed by the Crown. According to the Roman law, the property of all debtors to the State was tacitly mortgaged as a security for the discharge of their obligations. "It is certain," says the Digest, "that "the property of a person who contracts with the State is "bound as a pledge for the fulfilment of his obligations, "though there be no express stipulation to that effect." (c).

We have the unanimous testimony of all the French writers, to show that the Fisc in France enjoyed the same

(a) Ord. 4, Viet., cap. 30, sec. 22; 12 Viet., cap. 48, sect. 1.

(b) Ord., 4 Vic., cap., 30, sec. 23; 8 Viet., cap., 27, sect. 1, 2.

(c) Certum est ejus qui cum fisco contrahit, bona veluti pignoris titulo obligari, quamvis id non specialiter exprimatur. L. 2, C. in quib. caus. pig.

hypothec as the Fiscus at Rome. (a) It was always reputed a hypothecary creditor, whatever was the nature of the debt, or the form of the instrument evidencing it. (b) "Thus, for example," says Domat, "those who farm the "King's taxes, and all persons who contract obligations "towards the fisc, by leases, sales, contracts of hire, or "other agreements, hypothecate their property by the sim- "ple effect of the obligation which makes them debtors, "though no mention be made of a hypothec." (c)

110. It is fortunate that we can adduce such precise and unquestionable authority on the point, for the Ordinance carefully abstains from pronouncing on the nature of the claims which are secured by the legal hypothec it confirms. It merely says that it shall exist upon the lands, &c., of "debtors and persons who have contracted "or entered into any debt, suretyship, engagement, or lia- "bility to Her Majesty, her heirs, or successors, *for and* "*in respect of which, an hypothec is established by the* "*existing laws of this Province.*" (d)

It may, therefore, be laid down as a general principle that, in Lower Canada, the Crown enjoys a tacit hypothec on all the property of its debtors, whatever be the origin of the debt, or the nature of the instrument under which it claims. Deeds of sale or lease, contracts, recognizances, bonds, (as Custom House Bonds) and all other instruments establishing a debt or liability to the Crown, bear

(a) Domat, Dr. Pub., lib. I., tit. 6, sect. 7 § 7; Poth., Hyp., ch. 1, sect. 2, art. 3; Basnage, ch. XIII; Fèvre de la Planche, Traité du Domaine, vol. 3, p. 287, L. XI., ch. 3, §. 2; Lebret, Souveraineté du roi, p. 116, L. III., ch. 10; Ferrière, D. D., vo. Fisc.

(b) Fèvre de la Planche, v. 3, p. 246, Liv. X., ch. 1; Basnage, ch. XIII.

(c) "Ainsi, par exemple, les fermiers, ou les traitans des droits du domaine, et toutes personnes qui s'obligent envers le fisc par des baux, ventes, louages, ou par d'autres conventions, engagent tous leurs biens par le simple effet de l'obligation qui les rend débiteurs, encore qu'il ne soit pas fait mention de l'hypothèque." Domat, loc. cit.

(d) Ord. 4 Vict., cap. 30, s. 29.

a tacit general hypothec upon all the real property possessed by the debtor or obligor, at the time the debt was contracted, or the obligation executed, or acquired by him previous to its discharge. On all the property of public officers who farm the public taxes, or handle the public monies, the Crown enjoys a like tacit hypothec, as a security for their fidelity. (a)

111. This hypothec ranked formerly from the period at which the debt was contracted, or the public officer appointed. (b) Under the Ordinance, if it was created before 31st December 1841, it was allowed the same delay to be registered as other hypothecary claims, viz., till 1st November 1844. If registered within that delay, it ranked from the date of its creation: if not, its rank against subsequent registered purchasers, or hypothecary or privileged creditors for valuable consideration, was accounted from the date of its registry. (c) So, where the hypothec was created on a day subsequent to 31st December 1841, it ranks, when opposed to the same classes of claimants, from the date of its registry. (d)

112. Registration of the legal hypothec of the Crown is directed to be made by the Receiver General of the Province, the Secretary, or Registrar, the Inspector General of Her Majesty's domain, or any public officer in whose hands the documents requiring registration happen to be. But there is no reason for doubting that registration may be validly effected in this, as in the other cases of legal hypothecs by any person whomsoever. (e)

(a) Edit du 18 août, 1669.

(b) Basnage, and the other authorities above quoted.

(c) Ord. 4 Vict., cap. 30, s. 4; 6 Vict., cap. 15, s. 1; 7 Vict., cap. 22, s. 12; Regina vs. Parent es qual., S. C., Quebec, 1852.

(d) Ord. 4 Vict., c. 30, s. 1. Except in the case of bonds to the Crown under 9 Vict., cap. 62, which rank independently of registration, 9 Vic., c. 62, s. 18.

(e) Ord. 4 Vict., cap. 30, sec. 52; 8 Vict., cap. 27, sect. 1, 2.

113. There has been much controversy on the question whether, when two legal mortgagees, as the Crown and a minor, claim to be collocated on the proceeds of an immoveable acquired by their debtor subsequently to the creation of both hypothecs, they should be collocated concurrently, or the most ancient in date should be preferred. On the one side, it is urged that both hypothecs attach upon the property at the same moment of time, that is to say, the moment of its acquisition by the debtor, and that thus the Crown and minor are *in pari jure*. On the other, it is urged that general hypothecs, when affecting property acquired by the debtor subsequently to the creation of the hypothec, have a retroactive effect, and by a fiction of law are deemed to have attached at the moment of their creation. This latter sentiment has prevailed in the Courts. (a)

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SECTION II.

OF JUDICIAL HYPOTHECS.

114. *Definition: there was no judicial hypothec in the Roman law.*
115. *They were established in France by royal Ordinances.*
116. *Rules by which they are governed under the Ordinance.*
117. *The judgment must be registered to be valid against a subsequent purchaser, &c.*
118. *Case where the sum awarded by the Court below is reduced in Appeal.*
119. *Judgments against tutors and married men.*
120. *Judicial acts and proceedings.*

114. Judicial hypothecs are those which are established by the authority of a Judge or Court of Justice. They were not recognised by the Roman law: the *pignus*

(a) Poth., Hyp., c. 1, sect. 2, § 2; Battur No. 369; Ernst., p. 162, quest. 8. *Per Contra* Duranton, XIX., No. 370; Persil, Reg. Hyp., sur l'art. 2121; Nos 7 and 9.

prætorium and *pignus judiciale* were clearly mere seizures (a).

115. The judicial hypothec was first introduced into France by the Ordinance of Francis I, in 1539, which established that the proof or acknowledgement of the signature of a maker of a promissory note, or *cédule privée*, in a Court of Justice, should have the effect of hypothecating his property as security for the payment of the note or *cédule* (b). A few years afterwards, a similar hypothec was attached to all final judgments by the Ordinance of Moulins. It says: "from and after the moment "the final judgment is rendered, the party succeeding "shall have a hypothecary claim upon the property of the "party condemned, for the execution and satisfaction of "the judgment and sentence rendered in his favour (c)". It was soon found expedient to extend these provisions of the Ordinance to the judgments of Courts of original, as well as those of final appellate jurisdiction; and in accordance with this view, a royal declaration of 10th July of the same year (1566) decided that all judgments carried with them a general hypothec, the effect of which was suspended by an appeal; and that, while the hypothec created by the original judgment was destroyed by the reversal of that judgment in appeal, it was confirmed from its date, when the judgment was affirmed (d). These laws were ratified by the Code Civil of 1667, which enacted that judgments by default should bear no hypothec until signified to the Defendant's Attorney (e). The decisions of arbitrators were clothed with this hypo-

(a) Troplong, Priv. et Hyp., Nos. 485 bis, et seq.
(b) Ord. of 1539, arts. 92, 93.
(c) Ord. of Moulins, art. 35.
(d) Declaration of 10th July 1566, art. 11.
(e) Ord. of 1667, Tit. 35, art. 11

thecary character from the day of their judicial homologation (a).

116. The Ordinance interfered with these doctrines of the common law, only to introduce the rules laid down by the law of Brumaire an VII, viz., 1st—That no hypothec shall be established by any judgment, judicial act or proceeding, which does not award a specific sum of money: and 2nd—That future property shall not be affected by a judicial hypothec (b). Hence the problems which have exercised the ingenuity and acuteness of the Commentators on the Code Civil, as to whether judgments *quod computet*, judgments removing a tutor, &c., bear hypothec or not, as well as those which arise out of the unlimited effect given to the judicial hypothec, both in the ancient and modern jurisprudence of France, are devoid of immediate interest in this Province. Our law on the subject is clear, simple, and precise. All judgments awarding a specific sum of money, bear a general hypothic for such sum on all the property actually in the possession of the debtor, at the time of the rendering of the judgment. So also, judgments containing an adjudication of interest and costs of suit, or of interest and costs only, bear a similar hypothec for such interest and costs, without its being necessary to specify in the judgment the sum to which they amount (c). No other judgments bear hypothec.

117. To render this hypothec valid and operative against subsequent bona fide registered purchasers, or mortgagees, or privileged or hypothecary creditors, for valuable consideration, the judgment must be registered. If it was rendered before 31st December, 1841, a registration made at any time before 1st November, 1844, will

(a) Poth., Hyp., ch. 1, sect. 1, art. 2; Despeisses, part 3, sect. 3, No. 12.
(b) Ord. 4 Viet., cap. 30, sec. 30.
(c) Ord. 4 Viet. cap 30, sec. 30.

be as good and valid as though it had been made immediately after the promulgation of the Ordinance, and will save all the rights of the judgment creditor, as though no Registry Law had been passed (a): if that delay have been allowed to expire, or if the judgment be posterior in date to 31st December, 1841, the judicial hypothec, when opposed to the above mentioned parties, will rank only from the date of its registration (b).

118. If a judgment of an inferior Court, awarding a sum of money, have been registered, and afterwards that judgment be reformed in appeal, and the sum awarded reduced, the hypothec for the reduced amount will subsist from the original registration (c).

119. It is very obvious that a judgment rendered against a Tutor or Curator in those capacities, bears hypothec, when registered, on the property of the minor or interdict only (d). A judgment rendered against a husband for a debt contracted by him previous to his marriage, bears no hypothec on those couquets of the community which fall to the share of his wife at the dissolution; but if the debt had been contracted by him during the marriage, the hypothec would attach on all the conquets of the community (e).

120. The above rules are applicable to such judicial acts and proceedings, as award or secure a specific sum of money (f). Among these, recognizances, bail bonds, (except these to the Sheriff,) *cautionnements judiciaires*, &c., have usually been classed. It may, however, be

(a) Ib. sec. 4; 6 Vic. cap. 15, sec. 1; 7 Vict., cap. 22, sec. 12.

(b) Ib. ib.; and Ord. 4 Vict., cap. 30, sec. 1.

(c) Poth. Hyp., cap. 1, sec. 1, art. 2; Ferrière on Paris, 170; Troplong, Priv. & Hyp., No. 443 ter; 1 Grenier, 196.

(d) Poth., loc. cit.

(e) Poth., Communauté, No. 752, 753; Troplong, Priv. et Hyp., No. 436 ter; Persil, Reg. Hyp., art. 2123, No. 29; Per Contra, Rolland de Villargues, and some other jurists.

(f) Ord. 4 Vict. cap. 30, sect. 30.

be a question whether a judicial bond carries with it such a judicial hypothec as to affect all the property possessed by the debtor at the time of its execution, or whether, under the section governing voluntary hypothecations, it ought not to contain a description of the property the debtor intends to hypothecate. Parties to whom bonds are granted will do well to adopt this latter view, as the safest, and insist on a special hypothecation of sufficient property to guarantee the debt.

SECTION III.

OF CONVENTIONAL HYPOTHECS.

121. It does not form part of the design of this Essay to give a history of hypothecs, or to treat all the interesting questions which have been mooted respecting their

legal effect. A very brief sketch of the leading historical data, and elementary principles, is all that can be attempted.

122. At Rome, real property could be hypothecated by parol: written deeds of hypothec were merely used as evidence, and were of greater or less value, in proportion to the solemnity with which they had been executed, and the authenticity of their character (a).

We find a very different system in operation in France, at the time when the earliest jurists wrote. All authentic *actes* carried with them a general hypothec, whether the formula by which the debtor formally created a hypothec was expressed or not. This rule is traced by Loiseau to the habit into which the notaries had been permitted to fall, of coupling the clause binding the property of the debtor, with that binding his person, as a matter of course, and without any express signification of such design on the part of the debtor (b). In point of fact, an acknowledgment of indebtedness and a promise to pay, comprehend, as a matter of necessity, an engagement to take all feasible means of effecting payment. This can only be effected out of the debtor's property. In the abstract, therefore, every promise to pay is a hypothecation. But as the maxim ***Prior tempore, potior jure***—a rule founded on common sense and equity—prevented a Creditor from availing himself of this tacit pledge until his predecessors' claims had been satisfied; a fraudulent debtor was enabled to avoid payment of his just debts, by confessing a previous liability to a fictitious creditor. Hence the necessity of a rule by which the rank of a debt might be unquestionably determined: and hence the law, declaring that hypothecs on real property should only result from those instruments, which, from

(a) L. 4, Dig. De pig. et hyp.; Basnage Hyp., ch. XII.

(b) Loiseau, du Deguerp., liv. 3, chap. 1.

their official character, bore an authentic date. It still remained to make that date a matter of such notoriety, that no interested party could be defrauded through ignorance of it.

123. The defects of the French system, the attempts made to remedy them, and the régime which succeeded, have been mentioned elsewhere (a). Here it will suffice to add that the Ordinance did not fall short of the Code Civil, in remodelling this branch of our Jurisprudence.

The reforms it established may be reduced to three rules: 1st, All conventional hypothecs must be special, and the property hypothecated must be specially described: 2nd, No voluntary hypothec can be created, except for securing the payment of a sum of money: and 3rd, That sum must be distinctly stated in the deed creating the hypothec (b). With the exception oft hese three points, our common law remains in this particular as it was before the passing of the Ordinance.

124. Thus, those only who are capable of alienating, can grant a valid hypothec (c). A married woman cannot hypothecate her *propres* without the sanction of her husband (d): and if she have granted a hypothec during her coverture, without such sanction, and ratify it after her husband's death, it will rank from the date of the ratification only (e). A hypothec granted by a minor is not legally valid; but if ratified by him when he comes of age, it will rank from its original creation (f). The hypothec granted by a Tutor or Curator on the property

(a) Supra, chap. 1, sect. 1.

(b) Ord. 4 Vic., cap. 30, sect. 28.

(c) Basnage, ch. 8, No. 3.

(d) Paris, art. 223.

(e) Poth., Cout. d'Orl., Tit. 10, No. 144; Ib., Obligations, No. 50; Ib. Retraits, No. 125; Ib. Hypothèque, chap. 2, sect. 2, § 2.

(f) Poth., loc. cit.; Ferrière on Paris, 239; See Basnage, chap. 8, No. 3, for several contradictory arrets.

of his ward, or the interdicts under his control is only valid when it turns out to have been advantageous to the latter (a).

No one but the proprietor, or his attorney duly constituted (b) can grant a valid hypothec (c). But when a debtor hypothecates a property which does not belong to him, and afterwards becomes owner of the same, the hypothec will be valid from its date, (d) without prejudice, however, to hypothecs granted by the real proprietor before his purchase. If, subsequently to the creation of hypothecs by the proprietor, his right of property determines, and his title is either annulled or becomes inoperative, Loiseau furnishes a test to ascertain whether such hypothecs continue to attach on the property or not. "When the proprietor's title," he says, "is annulled in consequence of some cause operating in-"dependently of his will, then the hypothecs contracted "by him cease to exist (*sont résolues*); but, when the "avoidance of his title is an act of volition on his part, "the hypothecs continue to attach" (e). Hypothecs granted by an heir whose title to the succession turns out afterwards to be bad, and who is compelled to surrender it, are invalid; *resoluto jure dantis, resolvitur jus accipientis* (f). An heir, *grevé de substitution*, may validly hypothecate the property subject to the substitution: if the substitution takes place, the hypothec ceases to exist from the date of the delivery to the *substitué:* if, on the contrary, from the death of the latter, or from some other

(a) Basnage, Hyp., chap. 3, No. 3.

(b) It is not necessary that the power should be a notarial act. A letter is sufficient. Poth., Mandat, No. 28; Troplong, Priv. et Hyp., No. 510; Arret de Cassation, 27 May, 1819.

(c) Basnage, chap. 3, sec. 3; Troplong, Priv. et Hyp., No. 464.

(d) Basnage, chap. 3, §. 4; Merlin, quest., vo. Hypothèque, and auth. there cited.

(e) Loyseau, du deguerp., liv. 6, chap. 3, nos. 6, et seq.

(f) Troplong, priv. et hyp., No. 468.

cause, the property never passes from the *grevé*, the hypothec is as good as if he had been unconditional proprietor (a).

125. All immoveables which are susceptible of being sold, separately and by themselves, may be hypothecated. Thus not only lands and tenements, but *rentes foncières* and *constitueés*, rights of censive and usufructuary rights, are susceptible of being hypothecated (b). And so may an undivided share in real property (c). It is generally held now that *rentes urbaines* cannot be hypothecated without the land on which they depend (d). Pothier held that a hypothec, being a real right, could be hypothecated (e); but this has been doubted by writers of grave authority (f).

126. In treating of conditional obligations to which hypothecs are attached, the French jurists make a distinction between those whose condition is casual, or dependent upon chance, and those whose condition is potestative, or dependent on the will of the debtor. In the former, the hypothec ranks from the date of the execution of the deed (i. e., in our law, from its registration), though the condition be not accomplished till long afterwards (g). In the latter, the general rule is that the hypothec only dates from the performance of the condition (h). But if a banker opens a credit to a merchant, and takes a hypothec on his property as collateral security, the hypothec will rank from the execution (i : e : registration) of the deed, though no monies be advanced till some time after-

(a) Battur, No. 237; Persil, rég. hyp., sur l'art., 2124, No. 17.

(b) Poth, Hyp., cap. 1, sec. 2 § 1; Ib., Cout d'Orl., Tit. xx, No. 21.

(c) Guenet vs. Roy, S. C., Quebec, No. 276 of 1851.

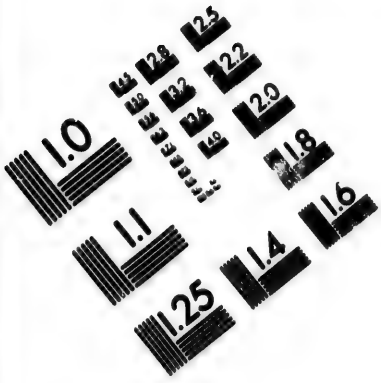
(d) Pardessus, servit., p. 8, No. 6; Duchesnay vs. Bedard, 1 L. C. Rep. 43.

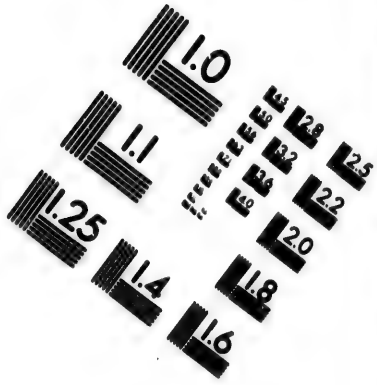
(e) Poth., loc. cit.; Ib., Cout. d'Orl., tit. des criees, No. 141.

(f) I Pigeau, 822; D'Hericourt, Vente, p. 313.

(g) Ferrière on Paris, 170; Domat, liv. 3, Tit. 1, sec. 3, No. 17; Basnage, cap. xi.

(h) Basnage, cap. xi; Troplong, Priv. et Hyp., Nos. 474 & 589.





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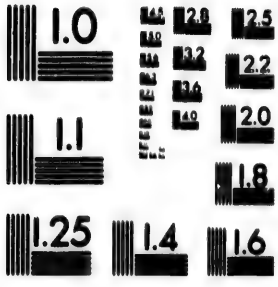

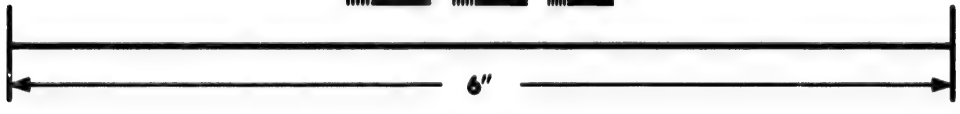

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2.2
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wards (a): the reason being, that the banker is presumed in law to have set apart, on the day of the execution of the deed, the sum of money fixed as the limit of the credit, for the special use of his borrower.

127. Passing to the rules of the Ordinance, it is required, in the first place, that "the lands, tenements or hereditaments, real or immoveable estates," hypothecated or encumbered by a conventional hypothec, be "specially described" in the deed constituting the hypothec (b). Thus, at one blow, general hypothecs, and hypothecs of future property, are abolished. The Code Civil, strictly as it adheres to the principle of speciality, tolerates an indirect mode of hypothecating future property (c); but the Ordinance allows no exception to the rule.

128. Questions may arise as to the nature of the "description" required. If the title of the Ordinance of 1667, which requires pleadings to contain a "description" of the real estate in litigation (d), be taken as a guide, it will be found that in the case of lands, it is necessary to state the "*bourg*, village or *hameau*" (parish and county, or township, &c.?) in which they are situate, their size, boundaries on the four sides, and condition, i. e., whether in meadow, wood, or under cultivation, &c.; and in the case of houses, their neighborhood, situation and boundaries. It was sufficient to state the name and position of an entire and well-known estate or *métairie*.

If reference be made to the article of the Code Civil which declares that no voluntary hypothec shall be valid

(a) I Grenier, No. 26; I Persil Quest., ch. 4; IV Pardessus, 281; Tarrible, Hypotheque, sec. 2 § 3, art. 6, No. 3; XIX Duranton, No. 244; Battur, No. 283; Arrets dela C. de Cass, 24th Jan., 1814, 26th June, 1814, 12th Jan., 1837, &c., &c. *Per Contra*, Troplong, Priv. et Hyp, No. 478 et seq.

(b) Ord. 4 Viet., cap. 30, sec. 28; C. C., 2129.

(c) C. C., 2130.

(d) Ord. 1667, Tit. IX, arts. 3 & 4.

unless the deed "specially declares the nature and situa- "tion of each of the immoveables actually belonging to "the debtor, on which he grants the hypothec (a)," it will be seen that the Courts have held that a hypothec constituted "*sur tous les immeubles possédés par un débi- "teur dans la commune de Succieu*" (b) was valid: and that a hypothec "*sur tous les biens situés dans la com- "mune de Saint-Sardis*" (c) was sufficiently special. Several other *arrêts* in the same sense are to be found in Sirey and Dalloz under the proper heads.

The true test of the sufficiency of the description would seem to be whether the object of the law—speciality—has been obtained, or whether subsequent hypothecary creditors or purchasers have been misled by a meagre or erroneous description. If doubts may reasonably be entertained on view of the Registrar's certificate, as to what property is hypothecated, the Creditor who has contented himself with an imperfect description ought to suffer: if, on the contrary, the property be plainly identified, though errors of detail may occur in the description, the hypothec will be upheld by Courts of Justice.

129. The second and third rules of the Ordinance are that "no hypothec shall be constituted or acquired for "any other purpose than for securing the payment of a "sum or sums of money;" and that "the sum of money "intended to be secured by such hypothec" shall be specified in the deed (d).

130. This provision, like the preceding ones, was borrowed from the Code Civil. But the Code adds: "if the "claim resulting from the obligation be conditional as to "its existence, or indeterminate as to its amount, the

(a) C. C 2129.
(b) Arrêt de Grenoble, 27 juillet 1827, Dalloz 30. 2. 120.
(c) Arrêt de la C. de Cass., 10 Feb. 1827, Dalloz 29. 1. 144.
(d) Ord. 4 Vict., cap. 30, sect. 28; C. C. 2132.

" creditor shall not inscribe except for an approximate " sum at which he shall state that he estimates his claims; " which sum may be afterwards reduced, on good cause " shown by the debtor" (a). No such exception having been made by the Ordinance, it is clear that a deed evidencing a debt indeterminate as to its amount would carry no hypothec with it.

131. But there does not seem to be any thing in the law to prevent parties securing the payment of indeterminate debts, or the performance of obligations to do or to forbear from any act, by estimating the probable amount of such debt when liquidated, at a certain sum, and obliging their debtor to grant a hypothec for that sum: or by taking, in like manner, a hypothec for the sum at which the parties shall agree to assess the damages in case of breach or non-fulfilment of their obligation to do or to forbear. The object of the section above quoted being only to notify future creditors or purchasers of the amount of encumbrances on a property, that object may be attained without depriving a creditor of his right to exact a hypothec, in any case in which he could have had one under the old system. Hence there does not seem any reason for doubting that a contractor may validly grant a hypothec as a security for the due fulfilment of his contract to build: that an agent may validly hypothecate his property as a security for his faithful administration: or that a merchant may grant a valid hypothec to his banker as a security for advances or discounts to be thereafter made (b). But in all these cases the future debt must be approximately estimated at a fixed sum of money, and the hypothec granted for that sum. Any claim, however vague—any obligation, though

(a) C. C. 2132.

(b) Tarrible, Rep., vo. Hypotheque, p. 969; R. de Villargues, No. 64, et seq.; Dallos, ch. 2, sect. 4, art. 3, No. 16.

the breach only sound in damages—may thus apparently be secured by a hypothec for a fixed sum: which is in the nature of a penalty or *dédit* covenanted by the debtor to be paid in case of failure on his part to perform his obligation.

But if no sum be expressly mentioned in the deed of hypothec, however easy and simple it may be to estimate the creditor's claims, no hypothec will be created.

132. The general rule with regard to conventional hypothecs, is, that when opposed to subsequent *bonâ fide* registered purchasers, or hypothecary or privileged creditors for valuable consideration, they rank only from the date of their registration (a). But hypothecs and hypothecary rights prior in date to 31st December 1841, if registered before 1st November, 1844, rank from the date of their creation. If they were not registered till after 1st November, 1844, they rank against the above mentioned classes of creditors and purchasers from the date of their registry (b).

133. The registration of a hypothec prior in date to 31st December 1841, when effected before 1st November 1844, has been held to preserve the creditors hypothecary rights for all arrears of interest due on the obligation or deed (c).

(a) Ord. 4 Viet., cap. 30, sect. 1.

(b) Ib. 4; 6 Viet., cap. 15, sect. 1; 7 Viet., cap. 22 sect. 12.

(c) Ord. 4 Viet., cap. 30, sect. 4; McLaughlin vs. Bradbury, 3 Revue, 340; Pelletier vs. Michaud, 1 L. C. Rep., 165; Latham vs. Kerrigan, ib., 489; Regina versus Petitclerc, Ib. 284. There would be, doubtless, some presumption in venturing to assail the doctrine established by these four judgments—recognised, as it has been, by so many and so eminent judges. But still, as one court (that of Montreal in McLaughlin vs. Bradbury) expressed a contrary opinion, and as their views are shared by many members of the bar, the author may be permitted to quote the words of 16th section, as follows:

"Provided also, and be it further ordained and enacted, that no creditor "shall be entitled, by reason of any registered memorial of a mortgage,

134. In all cases of alimentary pensions, life rents, interest due on the price of property sold, and *rentes foncières* and *constituées*, granted, created, or constituted since 31st December, 1841, the registration of the creditor's title saves his hypothecary right to five years interest, and the current year, "reckoning from the date of such title." In all other cases of hypothecs created after that day, registration preserves the hypothec for two years ar-

"hypothec, or privilege, to a preference or priority before others, for more "than two years arrears of interest on the debt or capital sum thereby "secured, unless a memorial of his claim for arrears of interest to a spe- "cific amount, beyond the arrears of two years, shall have been separately "registered as being due under such mortgage, hypothec, or privilege, and "unless such creditor do, at the time of presenting such memorial to the "Registrar, or his deputy, make oath before such Registrar or his deputy, "(who is hereby empowered to administer such oath,) that the said speci- "fic amount of interest remains due and unpaid to him, or unless an affi- "davit to the same effect be sworn to before one of the Judges of the "Courts of King's Bench or Common Pleas for this Province, (who is "hereby empowered to take such affidavit) and delivered with such memo- "rial to the said Registrar, or his deputy."

The Courts have here interpreted the word "Creditor," to mean "creditor claiming under a hypothec created after 31st December 1841." It might be worth while to inquire the motive of a reading of the law so apparently arbitrary. Sir James Stuart is reported to have said in McLaughlin vs. Bradbury, that the fourth was the only retroactive clause in the law. Why, if such be the case, was the stereotyped restricting clause "from and after the day on which this ordinance shall come into force and effect," omitted in the 16th section?

Whatever reasons, however, may be urged against these judgments, the point may now probably be considered as settled, as far as the Courts are concerned. Of its practical effect, an opinion may be formed from the following case:

In Regina vs. Petitclerc, (1 L. C. Rep. 284), Derouselle, an Opposant, claimed the amount of an obligation, £100, with 17 years interest thereon, and was collocated accordingly for £202. According to the Registrar's books, his claim was thus one half what it turned out to be! Had his obligation been for £5000 on a property worth £10,000, his claims would have swallowed up the whole proceeds of sale, while the ostensible amount of his encumbrance on the property was only half its value! Where, under such a reading of the law, lies the advantage of a system of registry?

rears and the current year only, "reckoning from the date of the title" under which the creditor claims (a). Further arrears of interest may be secured by the registration of memorials of the amounts due; but the hypothec for such arrears only ranks from the registration of the memorial.

135. The expression above quoted, "reckoning from the date of the title," must not be misunderstood. It might be supposed at first blush, that it meant to restrict the creditor's hypothecary claim for interest to the two years and current year *immediately following the execution of his title* (b). This interpretation might gain weight from its having been formerly a question in France whether the three years granted by the Code Civil in the same language, were those immediately following the date of the hypothec, or those preceding the sale of the property (c). Fortunately, the invariable practice of the Courts will prevent such a point being raised here. The clause in question has always been understood to mean, that the "current year" allowed is to be computed from the same day and month of the year preceding the collocation as that on which the hypothec has been granted; and there is no doubt to-day that a creditor who has been regularly paid the first five or six years interest on his hypothec, and who afterwards allows his debtor to fall into arrears, can, notwithstanding, claim a hypothec for the last two years and current year, or last five years and current year, according to the nature of his claim. Thus, where a property, hypothecated on 1st February, 1846, is sold on 1st June, 1852, the creditor will be entitled to fyle a hypothecary claim for the interest accrued since 1st February, 1850; or, if his claim be on a *rente constituée, foncière*, &c., for the arrears since 1st February, 1847.

(a) 7 Viet., cap. 22, sec. 10.

(b) It has, in fact, been so interpreted by a Judge in Montreal; Latham vs. Kerrigan, 1 L. C. Rep., 492.

(c) Cour de Riom, 16th December, 1813; see Dallos Hyp., p. p. 409, 410.

136. A member of the Upper House devised, some years ago, "a short and inexpensive form of hypothecation" of lands, &c., held in free and common soccage, which he incorporated in the act prolonging the delay for the registration of old deeds and documents. It cannot, therefore, be unnoticed here. The clause in question says, that a simple acknowledgment of indebtedness, whereby the intention of the debtor to hypothecate shall be made manifest, shall be a valid hypothecation of the real property described in such acknowledgment, and of which the debtor is, at the time of its execution, lawfully and by right seized as of his own property. Such acknowledgment need not be made before notaries, but may be signed, sealed and delivered by the debtor, in presence of two witnesses. It must distinctly specify the sum for which it is granted. When made in accordance with these rules, it will, like notarial deeds of hypothecation, rank on the property from the date of its registration (a).

(a) 7 Vict, cap. 22, sec. 11.

CHAPTER IV.

OF THE REGISTRATION OF PRIVILEGES.

137. *Definition of a privilege: classification.*

137. A privilege is a right possessed by certain creditors in virtue of which they are preferred to all other creditors, whether hypothecary or chirographary, on the proceeds of sale of their debtors' property (a). It is derived from the peculiar favour with which the law regards their claims. Hence the rank of privileges is not determined by their date, but by their nature: ***privilegia non ex tempore, sed ex causa estimantur.***

Privileges have been divided into three classes: those which affect moveables: those which affect immoveables; and those which attach on both (b). It does not fall within the compass of this Essay to examine privileges on moveables.

Some privileged claims require registration to preserve the privilege: others exists independently of that formality.

SECTION I.

OF PRIVILEGED CLAIMS REQUIRING REGISTRATION TO PRESERVE THE PRIVILEGE.

138. *Enumeration.*

138. The thirty-first section of the Ordinance declares that the following privileged claims must be registered: 1st. That of the vendor for the price of the real property

(a) C. C. 2095; Dunnage, Hyp., ch. 14; Loyseau, Offices, Liv. 3, ch. 8, No. 88.

(b) C. C. 2101, 2103, 2104.

sold by him; 2nd. That of the lender of money for the purchase of real property, for the repayment of his loan; 3rd. That of heirs or other copartitioners for the warranty incident to the partition, and the soulte and retour; 4th. That of architects, builders, and workmen, for the price of their labour and materials; and 5th. That of parties who have lent money to pay such architects, builders, and workmen, for the repayment of their loan.

How this enactment has been carried out in practice, will be seen in the following articles.

ARTICLE I.

OF THE VENDOR.

139. *Privilege of unpaid vendor at Rome and in France.*
140. *Cases in which, at common law, the privilege can be claimed.*
141. *Provisions of the Ordinance, ordering the registration of the vendor's privilege.*
142. *Reasons why it should not be registered.*
143. *A privilege does not rank from its date: if it ranks from its registration, it becomes a mere hypothec.*
144. *Reasons why the Ordinance did not intend to substitute a hypothec for the vendor's privilege.*
145. *There is only one possible mode of registering privileges, viz., by fixing a delay.*
146. *No delay having been fixed for the vendor, must he be assimilated to the negligent copartitioner, &c.?*
147. *Reference to the Code Civil: interpretation given to it.*
148. *Analogy: the vendor's privilege is independent of registration.*
149. *Lamentable results of this decision. Query: whether the point could have been decided otherwise.*
150. *Exception: case of property sold to Railway Companies.*
151. *This does not apply to vendors prior to the Ordinance, who must register.*
152. *Rule with regard to interest.*
153. *Unpaid vendors may demand the restitution of the property.*
154. *Contestation between hypothecary creditors and vendor, or several vendors.*

139. The vendor had no privilege in the Roman law: he was simply entitled to detain the thing sold until he was paid (a).

The first instance we find in the jurisdiction of the Parliament of Paris, of a vendor being collocated by privilege on real estate, is in a case in July, 1660, reported by Basnage (b). After this date it became a settled point in French jurisprudence, that unpaid vendors must be preferred on the proceeds of the real estate sold by them to all other creditors of their purchaser, for the price (c).

140. Purchasers who have bought under a covenant to allow the vendor an equity of redemption (*clause de réméré*), do not enjoy a similar privilege for the sum they are entitled to demand from the vendor, in case he redeems the property; there being no new sale, but only an extinguishment of the old one (d). A majority of the modern French writers concur in the opinion, that no such privilege exists in the case of exchanges of real estate (e), unless a *soulte*, or difference, or return in money be stipulated, in which case the transaction has the features of a sale, as well as those of an exchange (f).

141. The Ordinance says that "the privileged creditors "of whose privileges and privileged rights and claims, "memorials shall and may be registered in pursuance "of this Ordinance, are, and shall be adjudged to be the "following, that is to say, firstly, the vendor upon, and in "respect of the real estate sold by him for the recovery

(a) L. 1, § 4, D., de minor.; II. Poth. Pand., 161, No. 6; Poth. Hyp., chap. 1, sec. 1, act 3, in fine; Basnage, Hyp., p. 67.

(b) Basnage, Hyp., chap. 14, p. 66.

(c) Poth. Hyp., ch. 1, sec. 1, art. 3, in fine; Ib., ib., ch. 2, sec. 3; Ib., Cout. d'Orl., Tit. 20, No. 19; Domat, Liv. 3, Tit. 1, sec. 5, No. 4.

(d) Poth., Vente, No. 412; Troplong, Priv. et Hyp., No. 214.

(e) Troplong, Ib., No. 200 bis, 215; Persil, Reg. Hyp., sur l'art 2103, § 1, No. 11; Duranton, No. 155; Battur, No. 69; *Per contra*, Dalloz, Hyp., p. 49, No. 9.

(f) Troplong, priv. et hyp., No. 215; 3 Delvincourt, 280.

" of the price thereof," (a) and declares that every "deed, " conveyance.... *privileged* and hypothecary *right and* " *claim*.... which shall, after the day last mentioned " (31st December 1841,) be entered into .... acquired " or obtained, shall be adjudged to be inoperative, void, " and of no effect against any subsequent *bonâ fide* pur- " chaser, grantee, mortgagee, privileged or hypothecary " creditor or encumbrancer, for or upon valuable consider- " ation, unless such memorial thereof as by this Ordi- " nance is prescribed, shall have been registered before " the registering of the memorial of the deed, conveyance, " notarial obligation, contract, instrument in writing, " judgment, judicial act or proceeding, recognizance, " *privileged* or hepothecary *right or claim*, or encum- " brance under which such subsequent purchaser, grantee, " mortgagee, privileged or hypothecary creditor or encum- " brancer shall claim." (b)

This seems clear enough; and, if to these clauses be added the section of the subsequent Statute, enacting that " the registration of the creditors title shall have the effect " of saving his hypothec or privilege for five years inte- " rest or arrears, and those for the then current year"... in the case of " any real property sold for a sum payable " at any fixed term or terms, or sold for an irredeemable " ground rent, or for a perpetual but redeemable rent, " commonly called a *rente constitue*" (c)—evidently showing that the registration of deeds of sale by the vendor was contemplated by the Legislature—it may probably appear strange that in the face of such enactments, the Courts should have held that the vendor was not required to register.

142. Such, however, is the case. And on a review of

(a) Ord. 4 Vict., c. 30, s. 31.
(b) Ib., s. 1.
(c) 7 Vict., c. 22, s. 10.

the reasons which may be urged in support of their judgments, it cannot be denied that they possess great weight and cogency.

143. In the first place, it is of the essence of a privilege that in consideration of the favour with which the law regards its cause, it ranks before all hypothecs granted by the party by whom it has been created: and this, independently of the time of its creation. (a) Destroy this particular characteristic—make its lien on the property operative from a certain day only—and the *privilege* ceases to exist. It is no longer a privilege, but a mere hypothec. If therefore, the rank of the privilege depends on its registration, as would appear to be the case from the above quotations from the Ordinance, the real effect of that law has been to do away with the privilege of the vendor altogether.

144. Such an intention is not easily reconciled with the language of the 31st section already quoted. And if it were still argued that it was the design of the Ordinance to abolish a privilege which it recognises and confirms in the most emphatic terms—it is unlikely that a Court of Justice would lightly venture on despoiling a large class of the community of rights which are firmly established in our common law, and are founded on the soundest reasons of public policy and equity, without a direct, positive enactment to that effect. Something more than the general expressions of the 1st section would be expected by a judge, who was called upon to reduce the vendor to the rank of a mere hypothecary creditor, and thus to place a fatal check on the transmission of property.

145. Again, it is true that equally powerful reasons may be adduced in favour of the registration of privi-

(a) Poth. Hyp., Art. Prél.; Ib. ib., c. 2, s. 3; Domat, liv. 3, s. 5, No. 2; Basnage, ch. XIV., p. 62.

leges, as of hypothecs; the interest of lenders and purchasers requires that all encumbrances, as well those which are privileged as those which are not, should appear in the Registers. It is also obvious that it must be made the interest of the creditor in all cases to register, and that a certain penalty must be attached to his neglect. Thus far, hypothecs and privileges agree; but the same mode of registration cannot apply to both. Hypothecary creditors cannot object to their claims being made to rank from the date of the registration, instead of that of the execution of their hypothec; but the vendor or architect would have just grounds of complaint, if their privileges were taken from them, and a mere special hypothec, ranking from the date of its registration, granted them in its stead. The only possible compromise between the demands of publicity on the one hand, and the just rights of privileged creditors on the other, is the course which has been adopted in the case of the copartitioner, the builder, and his assignee. A delay is fixed within which they are required to register; if they do so, their privilege exists as though no registry law had been passed; if they fail to do so, their privilege is taken from them *as a penalty for their neglect*, and they are only entitled to a mere hypothec ranking from the date of its registration.

146. No such delay is fixed for the vendor. He cannot therefore be governed by the rule which obtains with respect to other privileges. Must the vendor, who exercises due diligence, and is ready and willing to comply with the requirements of the law, be placed on the same level with the copartitioner and architect who have wilfully neglected and violated it?

147. If a clue to the intentions of the framer of the Ordinance is to be found in the Code Civil, which, like the Ordinance, obliges the vendor to inscribe his privilege, but does not specify any period within which such registra-

tion must be effected (a), it will be found that in France, it has always been held that so long as the property remained in the hands of the purchaser, the vendor could inscribe, and claim priority, in virtue of his privilege, over hypothecary creditors who had registered before him (b); but that he could no longer beneficially inscribe, after the alienation of the property by the purchaser, *such alienation having had the effect of discharging all unregistered encumbrances on the property* (c). The effect here attributed to alienations is a consequence of the article of the Code Civil, which states, that "Creditors who have a registered privilege (*privilége inscrit*) or hypothec upon an immoveable follow it into whatever hands it passes;" (d) thus intimating tacitly that privileges which are not inscribed do not follow the property when it changes hands.

148. But this article is an innovation upon the common law, at which all hypothecs and privileges continue to attach upon property, no matter how often it changes owners (e). We have, in our law, no rule or enactment of similar import to the article of the Code. The grounds, therefore, upon which the vendor's right to inscribe his privilege is made co-existent with the purchaser's tenure of the property, in France, are unknown to our jurisprudence, and the inference drawn from them is inapplicable here. In Lower Canada, nothing but a judgment of ratification, or a Sheriff's sale can discharge a hypo-

(a) C. C., 2108; *Aliter*, in the Code of Louisiana, arts. 3238, 3240.

(b) Troplong, Priv. et Hyp., No. 279; Duranton, No. 170, 210; Dallos, ch. 1, sect. 4, art. 1, § 3, No. 16, and arrêts there quoted.

(c) Troplong Priv. et Hyp., Nos. 280, 896, et s.; XVI Merlin, vo. Inscription, p. 451; II Grenier, 617.

(d) C. C., 2166. Other rules now obtain in France, in consequence of the 834 art. of the Code of Procedure; but they are irrelevant to the question at issue in the text.

(e) Poth. Hyp., cap 2, art. prél.; Paris, 101, 114, &c., and Ferrière thereupon; Basnage, &c.

thec or privilege. Keeping this distinction in view, if we construe the section of the Ordinance as the analogous article of the Code has been construed in France, it will appear that the vendor is bound to register; but that he is always in time to do so, until the property is purged in due course of law, and that his registry has a retroactive effect to the day of the sale. This amounts, it is hardly necessary to say, to exempting him from registering altogether.

On some such grounds, the Courts, both of original and appellate jurisdiction, have held that the privilege of the vendor does not require registration to preserve it (a).

149. To point out that these decisions are diametrically contrary to the spirit and object of the Registry Law—that they fortify instead of destroying the secret encumbrance system—is to assert a proposition which must strike every reader. Still—between Scylla and Charybdis—the letter and the spirit of the law—the rights of unpaid vendors on the one hand, and the interest of hypothecary creditors and purchasers on the other—it will probably be admitted that the Courts have pursued the safest and least inconvenient course of those which the imperfections of the law offered them. The real source of the difficulty—the omission of a delay for the vendor to register—has been elsewhere noticed (b). Until the Legislature has supplied this deficiency, the Province will not reap the full benefits of a system of Registry.

(a) In re Sleaven, 3 Revue 56; Shaw vs. Lefurgy, 1 L. C. Rep. 5, and Wilson and Atkinson, 2 L. C. Rep. 5; Routier vs. Lachance, No. 482 of 1851, S. C. Q. Judgments are said to have been rendered by the old Court of Queen's Bench, deciding that the vendor was bound to register; but I have not been able to find any trace of them. Mr. Justice Aylwin and Mr. Justice Duval dissented from the judgments in Shaw vs. Lefurgy, and Wilson and Atkinson: and Sir Jas. Stuart is believed to concur with them. The Judges who sat in these cases were the Honbles J. Rolland, Panet, Duval and Meredith.

(b) Supra No. 22.

150. Parties who, having sold lands to a Railway Company, are obliged or consent to allow the whole or a portion of the price to remain on the lands, require to register the deed of sale in order to claim a privilege on the Railway and the tolls. (a).

151. The foregoing remarks apply only to sales made after the passing of the Ordinance. In cases where the privilege existed before 31 Dec. 1841, if the vendor have failed to register before 1st November 1844, his privilege cannot be invoked to the prejudice of subsequent *bonâ fide* hypothecary creditors or purchasers for valuable consideration, who have registered before him (b).

152. According to the laws in force before the Ordinance was passed, the vendor was privileged for all the interest due on the price of the property sold (c) The Ordinance declared that no "creditors should be entitled by reason of any registered memorial of a... privilege, to a preference... over other creditors for more than two years arrears of interest and the current year" (d) : and a subsequent statute enlarged this period, in the case of purchase money of real property, to five years and the current year, which are secured by registration of the deed of sale (e). It is understood that these enactments were prospective only : the fourth section of the Ordinance being, according to Sir James Stuart, the only retroactive provision in that law (f). Since, however, the vendors claim for the principal of his debt is now considered to be valid against registered purchasers or

(a) 14 & 15 Vict., cap. 51, sect. 11 ter.

(b) Ord. 4 Vict., c. 30, s. 4 ; Dionne vs. Soucy 1 L. C. R. 8 ; Ensor vs. Orkney 1481 of 1851, S. C. Q.

(c) Basnage Hyp., ch. 6, p. 16; 1 Despeisses, Tit. *Achats et Ventes* ; D'Hericourt, ch. 11, sect. 2, No. 39.

(d) Ord. 4 Vict., ch. 30, s. 16.

(e) 7 Vict., c. 22, s. 10 ; Latham vs. Kerrigan 1 L. C. Rep. 489.

(f) Dictum of Stuart, Ch. J, in Bradbury vs. McLaughlin.

mortgagees without registration, semble that no registry is required to preserve his privilege for interest.

The Registration of deeds of sale anterior to 31 Dec. 1841 is held to preserve the creditors claim for all the interest due at the time of such registration, and that to accrue afterwards (a).

153. Besides this privilege, vendors had, in France, the right of demanding that the contract of sale be annulled and set aside, in consequence of the purchaser's failure to pay the purchase money. (b)

154. The privilege of the vendor is preferred to all hypothecs granted by the purchaser. When several vendors claim to be collocated by privilege on the same immoveable, the first is preferred to the second, the second to the third, and so on.

ARTICLE II.

OF THE LENDER OF MONEY TO PAY THE VENDOR.

155. *Origin of the privilege.*
156. *When properly subrogated, the lender enjoys the same rights as the vendor.*
157. *Period which must elapse between the deeds of loan and purchase.*
158. *Rule as to registration.*

155. By the law of Canada, he who furnishes a purchaser with money for the purchase of real property, may, on certain conditions being fulfilled, enjoy the same privilege for securing the repayment of his loan as the vendor. This was the law in the jurisdiction of the Par-

(a) See supra, ch. 3, sect. 3, No. 138.

(b) 1 Despeisses last sect., No. 19; Poth. Vente No. 476; Troplong Priv. Hyp., No. 222.

liament of Paris (a), and has been adopted, without modification, by the Ordinance.

156. The conditions specified by the latter are, "that it be ascertained by the instrument or writing evidencing the loan, that it was intended to apply the money to the purchase of real estate, and, by the acquittance of the vendor, that the payment of the price was made by and with the money so lent and advanced" (b).

When the deeds of loan and of discharge establish these facts, the lender is subrogated *pleno jure* in the room and stead of the vendor (c), and, like him, is preferred to all other creditors. If the vendor had only been paid a portion of the price by the bailleur or lender, who was subrogated for such portion, the vendor would rank before him for the balance remaining unpaid (d). *Creditor non videtur cessisse contra se.* It would be different if the vendor had ceded or sold a portion of his claim.(e)

157. No subrogation will take place, if the period of time which elapses between the loan and the purchase is unreasonably long. Various periods are assigned by the old writers, from Renusson, who states that both transactions must take place on the same day (f), to the authors quoted in the *Repertoire*, who consider a delay of ten days not too long (g). The real test, in such cases,

(a) Reglement du Parlement de Paris, 6 Juillet 1690; Loüet, Lettre H, Somme 21; Loyseau Offices, liv. III., ch. 8, No. 44.

(b) Ord. 4 Vict., c. 30, sec. 31; C. C. 2103.

(c) Troplong P. & H., Nos. 229, 230; VII Toullier, No. 129; Dalloz, No. 20; Tarrible, &c.

(d) Troplong P. & H., No. 233; XIX Duranton, No. 177; Dumoulin, de cont. usur., quest. 89.

(e) Wurtele vs. Henry and Campbell, Op., 1983 of 1851, S. C. Q. Troplong, priv. et hyp., No. 367; Duranton, No. 228.

(f) Renusson, ch. IX, No. 12.

(g) Bacquet, Droits de Just., ch. II, No. 241; Repertoire vo. *Subrogation*, p. 37, col. 2.

will be to ascertain whether it is likely and probable that the purchase was actually made with the money borrowed, or with money derived from another source.

158. It is obvious that the privilege of the lender of money to pay the vendor is not a separate and distinct privilege. It is, in reality, the privilege of the vendor, exercised by his assignee. The same rules will therefore apply to its registration as to the case of the vendor. If the transaction out of which the privilege grew, was anterior to 31st December, 1841, the lender of money, who has neglected to register before 1st November, 1844, will be postponed to subsequent bona fide hypothecary creditors, or purchasers, for valuable consideration, who have registered before him. If, on the contrary, the loan and purchase were subsequent to 31st December, 1841, the same reasons exist for exempting the lender from registering, as have been above applied to the case of the vendor.

ARTICLE III.

OF HEIRS AND COPARTITIONERS.

159. *Origin of the privilege.*
160. *On what property it attaches.*
161. *It must be registered within thirty days.*
162. *Case of contestation between vendor and copartitioner.*

159. Equality is of the essence of partitions (a). Hence where the lots which fall to the share of the several co-heirs or co-proprietors, by the partition, are unequal in value, it is usual to stipulate that a ***soulte***, or return in money, shall be paid by the owners of the most valuable

(a) Poth. communauté, No. 715.

lots to those whose share of the common property is the least: and the law secures the payment of such *soulte* or return in money by a privilege on the lots of those who agree to pay it (a). By a similar privilege, the warranty incident to the partition, which copartitioners are bound in law to hold out to one another, is also secured (b), and, in like manner, in cases of sales by licitation, where the purchaser is one of the heirs or copartitioners (c), the price of the property sold is a privileged claim thereon (d).

160. These privileges have been expressly recognised by the Ordinance (e). The claim of the creditor of the soulte or return in money is privileged upon the lots of those of his coheirs or copartitioners who have agreed, at the partition, to pay it. The privilege for the warranty attaches upon each separate lot into which the property is divided; each copartitioner being bound to guarantee his copartitioner's title. The privilege for the price of a property sold by licitation attaches upon the whole of such property.

161. But the property is not held in law to be incumbered by such privileges, unless a memorial of the same be registered within thirty days from the partition (f), or sale by licitation (g). The day on which the partition or sale by licitation is made is not included in the thirty (h).

(a) Lebrun, successions, liv. 4, chap. 1, No. 34; Basnage, hyp., chap. 6, p. 14; Repre. vo. hypothêque, p. 798; Poth., successions, chap. 4, art. 5, § 4.

(b) Lebrun, ib. No. 60; Poth. Vente, Nos. 633, et seq.

(c) If the property were sold to a stranger, the creditors of the price would enjoy the vendor's privilege for securing it. Duranton, No. 211, Dalloz, No. 6.

(d) Poth., hyp., chap. 1, sect. 1, art. 3.

(e) Ord. 4 Vict., cap. 30, sects. 31, 32.

(f) For an elaborate argument as to the moment when the partition takes place, see Troplong Priv. et Hyp., No. 318 bis.

(g) Ord. 4 Vict., cap. 30, sect. 32; C. C., 2109, which fixes 60 days as the delay.

(h) Troplong Priv. et Hyp., Nos. 295, et s., refuting Merlin to the contrary.

If the copartitioners, or vendors by licitation, have allowed this delay to elapse without registering, their privilege is lost. Their claims, however, still retain a hypothecary character, and rank on the property divided, as special hypothecs, from the date of their registration (a).

The above applies to cases of partitions and sales by licitation, subsequent to 31st December 1841. Cases which occurred previous to that date are governed by the same rules as sales prior to the Ordinance (b).

162. It is hardly necessary to observe that, the privileges of the vendor and copartitioner being derived from the same source, and identical in their nature, should a contestation occur between them, the preference must be given to the most ancient in date (c).

ARTICLE IV.

OF ARCHITECTS, BUILDERS, AND WORKMEN.

163. *Origin of the Privilege.*
164. *For what claims it exists.*
165. *Means adopted for the prevention of frauds.*
166. *Interpretation of a clause in the Ordinance.*
167. *Both Procès-Verbaux must be registered within thirty days.*
168. *Contestation between architect and vendor, &c.*

163. The Emperor Marcus Aurelius was the first who gave parties who advanced money for the construction of buildings a tacit hypothec thereon for the repayment of their loan. (d) His senatus-consultum was adopted by

(a) Ord. 4 Vict., 30, sect. 32; C. C., 2113.

(b) Ord. 4 Vict., cap. 30, sect. 4; supra, No. 151.

(c) Dalloz, ch. 1, sect. 3, art. 1, §. 2, No. 3; Troplong, Priv. et Hyp., No. 81.

(d) L. 1, D. in quib. caus. pig. vel hyp. tac. const.

most of the French Parliaments, and a privileged hypothec, as it was then called, was granted as well to the builder who had repaired or constructed an edifice, as to the capitalist who had advanced the funds required for such works. (a) The Ordinance confirms this privilege to "architects, builders, or other workmen employed in "the building, rebuilding or repairing, of buildings, ca- "nals or other erections or works." (b) It has been held that the language of the Code Civil, of which that of the Ordinance is a mere translation, did not extend to clearances of wild lands, agricultural ameliorations, or mines; and special laws have been passed in France to extend the privilege to these cases. (c)

164. It exists for the amount due to such architects, builders, and workmen—a *quantum meruit*, it is presumed, for their labour and materials: and attaches on the buildings or constructions made or repaired by them, to the extent of the increased value given to the premises by their works—*in quantum res pretiosior facta est.* In other words, if the balance due to the workmen is less than the increased value given to the premises by their works, they have a privileged claim for the whole of such balance; if, on the other hand, the sum due to them is greater than the increased value their works have given to the premises, their privilege can only be exercised on the amount of such increased value, and they are chirographary creditors for the balance. The increase in value is to be computed at the time of the alienation of the premises by the proprietor. (d)

165. The necessity of providing against fraudulent agreements between proprietors and builders, whereby

(a) Brodeau sur Louet, Lettre H., Somme 21, No. 8.

(b) Ord. 4 Vict., c. 30, s. 31; C. C., art. 2103.

(c) Troplong, Priv. et Hyp., No. 242 bis.

(d) Ord. 4 Vic., ch. 30, s. 31; Basnage, ch. XIV.; D'Héricourt, Vente, ch. XI., s. 1, No. 7; Loyseau, Deguerpissement, Liv. VI., ch. 9, No. 15.

the creditors of the former were injured, obliged the Chatelet of Paris to decide, in 1690, that no workman should be entitled to a privilege, unless he could show a notarial agreement, or *devis et marché*. This was afterwards found insufficient to prevent the commission of frauds; and a *réglement* was issued by the Parliament, in 1766, providing a safe and reliable method of ascertaining the nature and value of the works actually performed by the builder (a). On the basis of this *réglement* the rules of the Code Civil (b) and of the Ordinance have been framed. Its tenour cannot be more concisely, or more explicitly given, than in the words of the latter. The privilege shall exist, says the 31st section, "provided "that by an expert, named by any Judge for the Court "of King's Bench for the district, or by the Judge of the "District Court in the judicial district within which the "buildings or premises are situated, (Judge of Superior "Court, or Circuit Court of the Circuit in which. &c. ?), "there shall have been previously made a *procés verbal*, "establishing the state of the premises in respect of the "works about to be made; and provided also, that within "six months after the completion of such works, the "same shall have been received, and accepted by an ex-"pert in like manner named."

It is further requisite that the architect, builder, or workman, who is desirous of exercising his privilege, should show that both the above-mentioned *procés verbaux* have been registered, the latter of the two within thirty days from its date (c). When they are so registered, the architect, builder, or workman, has the first claim on the improvements made by him.

166. Some obscurity has been created by the clause

(a) 1 Pigeau, 810.

(b) C. C., 2103.

(c) Ord. 4 Vict., cap. 30, sec. 32; Ensor vs. Orkney, No. 1461 of 1851; Kilbride vs. McAllister, No. 1738 of 1851.

in the Ordinance which states that the architect's privilege "shall be accounted from the registration of a memorial of the first *procés verbal.*" It has already been observed, that privileges do not rank according to their date, but according to their nature—that their peculiar property is to precede prior hypothecs. If, therefore, the architect's privilege upon the works erected by him is postponed to the hypothecs of creditors prior in date to the commencement of such works, it is no longer a privilege, but a mere hypothec.

The question is fortunately not new: the Code Civil, like our Ordinance, declares that the privilege shall exist "*à la date de l'inscription du premier procés verbal*" (a). Tarrible, Grenier, Favard, and Rolland de Villargues are of opinion, that these words mean nothing, and are a *vice de rédaction:* Troplong, Persil, Dalloz, and Delvincourt, on the contrary, while they admit that the privilege of the builder must be preferred to all hypothecs prior to the beginning of the works, hold that it should rank after hypothecs granted after the commencement of the works, but before the registration of the first *Procès Verbal.* (b) Lenders, they argue, must not be misled by the negligence of the builder, and be induced, from an ignorance of his privilege, to believe the pledge offered them of greater value than it really is. This latter sentiment would appear to have been uppermost in the mind of the framer of the Ordinance when the clause in question was inserted.

167. However this be, it is clear that the privilege of the builder, when duly preserved by registration of both *Procès Verbaux*, is preferred on the works made by him, to all prior hypothecs on the property. But, if the thirty days imme-

(a) C. C., 2110.

(b) Troplong, P. and H., Nos. 322 et s.; Persil, Reg. Hyp., on art. 2110, No. 3; Dalloz, Hyp., pp. 48, 114; III, Delvincourt, 288.

diately following the date of the second *Procès Verbal* are allowed to elapse without the registration of a memorial of the builders' privilege, it is lost for ever. Like the copartitioner, he may still, by a tardy registration, preserve a hypothecary claim on the works for his debt; but his right of priority over prior hypothecs is irretrievably destroyed. (a)

When the works were made before 31st Dec. 1841, the builders' privilege is subject to the same rules as the vendors. (b)

168. It is obvious that in the case of a contestation between a builder and a vendor, or a builder and a copartitioner, the only mode of determining their respective rights will be by a *ventilation*. The vendor or copartitioner is entitled to rank before all other creditors on the premises as they were before the commencement of the works; the builder occupies the first rank on the improvements made by him (c).

ARTICLE V.

OF THE PARTY LENDING MONEY TO PAY ARCHITECTS, BUILDERS, OR WORKMEN.

169. *The lender of money must be subrogated in the room and stead of the architect or builder.*

169. The position of parties who lend money for the payment of architects, builders and workmen, is identical with that of the creditors whose claims they discharge,

(a) Ord. 4 Vict., cap. 30, sect. 32.
(b) Ib., s. 4; see supra, No. 151; and post, No. 175.
(c) Bedard vs. Dugal, No. 2001 of 1851, S. C. Quebec.

when the proper means are taken to subrogate them in their room and stead (a)

Such means are prescribed by the Ordinance. The intended application of the money lent must be ascertained by the instrument or writing evidencing the loan, and it must be proved by the acquittance of the workmen, that they were paid and satisfied by and with the money so loaned (b).

All the remarks made on the case of the lender of money to pay the vendor, will apply to this class of privileged creditors (c).

SECTION II.

OF PRIVILEGED CLAIMS NOT REQUIRING REGISTRATION TO PRESERVE THE PRIVILEGE.

170. *Privileges which attach on moveables do not require to be registered.*
171. *Nor seigniorial rights or claims.*
172. *Nor arrears of rentes foncières or ground rents.*
173. *Nor municipal assessments.*
174. *Nor city rates in the City of Quebec.*
175. *Nor the claim of Her Majesty for the amounts lent to the sufferers by the fires at Quebec.*

170. Those privileges which attach as well on moveables as on immoveables—or rather, which attach on the latter only in default of the former—are exempted from registration (d).

Such are the privileges by which the law secures the payment of

1st. The expenses of affixing seals for safe custody,

(a) Arrêt de reglement of 17 Aug. 1766; 1 Pigeau, 810.
(b) Ord., 4 Vict., cap., 30, sect. 32.
(c) Vide supra, Nos. 156, et seq.
(d) Ord. 4 Vict., cap. 30, s. 2.

and for making an inventory, when required by law; which rank before the claims of all other privileged creditors when they have been beneficial to them (a).

2ndly. The costs of suit incurred for the common benefit of creditors (b).

3rdly. Funeral expenses, provided they amount to a moderate sum, and have not been extravagantly incurred. They include the cost of the coffin and hearse, the hire of persons to watch the corpse, the cost of the church service (c), and the mourning of the widow (d).

4thly. The expenses of the last illness of the debtor, due to physicians, surgeons, apothecaries, and nurses (e).

And 5thly. Servants' wages for a period not exceeding two years. In the jurisdiction of the Chatelet, this privilege existed for one year's wages only, and was not enjoyed by any but town servants (f). The Code Civil grants it to "*gens de service*," which is interpreted by the commentators to include clerks, secretaries, agents and employés who are hired by the year (g). "*Gens de service*" is not, however, precisely identical with servants.

171. Besides these claims, which it would be difficult, if not impossible, to register, the law exempts from that formality all seigniorial dues, rights, servitudes, reservations, or services, whether legal or conventional. This includes the seignior's claim for arrears of *cens et rentes*,

(a) Domat Liv., III, Tit 1, sec. 5, No. 25; I Pigeau, 682.

(b) Ib. ib.; Poth., Proc. civ., part 4, ch. 2, art. 12, § 2.

(c) Basnage, Hyp., ch. 9; Poth., proc. civ., loc. cit.; Rousseau de la Combe, vo. Frais Funéraires; II Bourjon, p. 687, No. 64.

(d) Poth. Communauté, No. 678; Lebrun and Renusson, in eod. sens.; *Per Contra*, Basnage.

(e) Basnage, ch. 9; Brodeau sur Lonet, Lettre C., sec. 29, No. 4; Bacquet, Droits de Justice, ch. 21, No. 274; Poth. Proc. Civ., part 4, ch. 2, art. 7 § 2.

(f) Poth. loc. cit.

(g) Troplong, Priv. et Hyp., No. 142; Duranton, No. 58; Persil on Art. 2101, No. 2; Dalloz, &c.

for *lods et ventes*, for the *retrait conventionnel*, and for any other rights which may have been stipulated in the concession deed (a).

172. The like favour is shown to arrears of *rentes foncières*, or ground rents, for a period not exceeding seven years (b).

173. Assessments imposed by the Municipal Councils of Lower Canada, or municipal rates, are likewise privileged claims which are exempted from registration (c). The Act states that they shall be "a special charge bearing *the first hypothec* on the property" of the ratepayer; but it is obvious that the word "privilege" would have rendered the intention of the legislature more accurately than "hypothec," which is probably a mere *vice de redaction*.

174. So the privilege granted by a recent act to the Corporation of the City of Quebec, for five years and the current year, of city rates and assessments, is, in order to save expense, exempted from registration (d).

175. So the privilege enjoyed by the Crown for monies lent under the Fire Debenture Act, to parties whose property was destroyed by the fires at Quebec in 1845, for the purpose of rebuilding the burnt district, is expressly preserved, "without its being necessary to comply with any of the provisions of the Registry Laws of this Province (e).

(a) Ord. 4 Viet. cap. 30, sec. 2; 6 Viet. cap. 15, sec. 2.

(b) Ord. 4 Viet. cap. 30, sec. 2.

(c) 10 & 11 Viet., cap. 7, sec. 27; 13 & 14 Viet. c. 34, s. 18; Compare 9 9 Viet., cap. 27, sec. 36.

(d) 14 & 15 Viet., cap. 130, sec. 1, 2.

(e) 9 Viet., cap. 62, sec. 18.

SECTION III.

OF THE SEPARATION OF THE PROPERTY OF A DECEASED FROM THAT OF HIS HEIR.

176. *Origin of the right: it has been improperly classed among privileges.*
177. *What creditors are entitled to demand the separation.*
178. *At what period the action en separation could be brought in France.*
179. *Registration must be effected within six months.*
180. *Novation of the rights of the creditor or legatee.*

176. When creditors, after the death of their debtor, have reason to fear that his heir is insolvent, or is contracting debts which will prejudice their rights, they are entitled to demand that the property of the deceased be separated from the property of his heir, and that their claims be satisfied on the former in preference to those of the creditors of such heir (a). This operation is called in law ***séparation des patrimoines:*** and though it can hardly be called a privilege, as privileges are properly speaking, only exercised between creditors of the same debtor (b)—still, the Code Civil (c), and most writers on jurisprudence having classed it among privileges, it may be briefly alluded to in this place.

177. All creditors, whether privileged, hypothecary, or chirographary, and even the legatees of the deceased are entitled to demand the ***séparation des patrimoines*** (d).

178. Under the old French law, the action ***en séparation*** might be brought at any time within thirty years after the decease of the debtor or testator (e); but the

(a) Domat, Liv. 3, Tit. 2, Sect. 1; Poth. Successions, ch. 5, art. 4; Ib., Cout. d'Orl., Tit. 17, No. 127.
(b) Troplong Priv. et Hyp., No. 323.
(c) C. C., 2111.
(d) Domat and Poth., loc. cit.
(e) Dict. Droit, vo. Séparation des patrimoines.

Plaintiff could only demand a right of preference on such portions of the property of the deceased as were still in the possession of the heir at the time of the institution of the action, and could be specially distinguished as having formed part of the inheritance (a). In respect of those portions of the property which had been alienated by the heir, or had become so mixed with his private property as to defy all endeavours to distinguish the one from the other, his right was lost.

179. This is still the law, with respect to moveables. With respect to immoveables, the Ordinance provides that the creditors or legatees may preserve their rights in full force, by registering a memorial thereof within six months after the death of the debtor or testator. Such memorial must be specially registered on each and every of the estates of the succession (b).

When a memorial is so registered, within six months, it has a retroactive effect, and gives to the chirographary creditors of the deceased, a right of preference over all hypothecary creditors, to whom the heir has granted hypothec in the interval of the six months (c.)

180. Creditors or legatees are deemed to have waived their right to demand a separation, when they operate a novation of their claims, by accepting the heir as their debtor in the room of the deceased (d).

(a) Poth., loc. cit.; Domat, liv. 3, tit. 2, sect. 1, No. 5, and sect. 2; Lebrun, liv. 4, ch. 2, sect. 1, No. 24.

(b) Ord. 4 Vict., cap. 30, sect. 32.

(c) Ib., ib.

(d) Domat, liv. III, tit. 2, sect. 2, No. 2; Poth., Successions, ch. 5, art. 4.

CHAPTER V.

OF THE FORM AND MODE OF REGISTRATION.

181. Documents may be registered either at full length or by memorial (a).

182. Memorials must be in writing, and attested by two witnesses (b). They must be executed by the debtor or creditor of the sum secured, or by some person having an interest direct or indirect in their registry (c). When executed in Canada, they may be attested before a notary, a Commissioner for receiving affidavits to be used in the Courts, a Justice of the Peace, or the Registrar or his Deputy, before whom one of the witnesses to the memorial must make affidavit of its execution (d). When

(a) Ord. 4 Vict., c. 30, s. 1, 11, 40 et seq.; 7 Vict., c. 22, s. 5.
(b) Ord. 4 Vict., cap. 30, s. 10.
(c) 8 Vict., cap. 27, sect. 1.
(d) Ord. 4 Vict. c. 30, s. 12; 8 Vict., cap. 27, s. 1.

executed in Great Britain, or Ireland, the execution of the memorial must be proved by affidavit of one of the witnesses to the same, made before the Mayor or Chief Magistrate of any city, borough or town corporate. When executed in any of the British Colonies other than Canada, the affidavit must be made before the Chief Justice or a Judge of the Supreme Court of such Colony. When executed in a foreign State, it must be sworn to before a minister plenipotentiary, or a minister extraordinary, or a *chargé d'affaires*, or a consul of Her Majesty, accredited and resident within such foreign State, who are authorized by the Ordinance to administer the necessary oath (a).

The party registering must produce and exhibit to the Registrar with the memorial, the document, whether a "deed, conveyance, contract in writing, will, probate or "office copy of a will, notarial obligation, instrument in "writing, judgment, recognizance, appointment of a Tu- "tor or Curator, judicial act or proceeding, or privileged "or hypothecary right or claim," of which a memorial is to be registered. In the case of notarial deeds, it will be sufficient to produce a notarial copy of the deed. Any "office copy of a document or writing which may have "validity," or proceed from the authority of a Judge or Court of Justice, may, in like manner, be validly produced to the Registrar in lieu of the original. (b)

The contents of the memorial differ according to the nature of the document on which it is founded. It may validly include only a portion of that document. General rules respecting the form of memorials are supplied by the Ordinance.

183. Memorials of deeds, conveyances, and contracts in writing must state:

(a) Ord. 4 Vict., cap 30, sect. 12.
(b) Ib., s. 11.

1. The day, month, and year of the date of the deed, conveyance or contract;
2. The names, residences, and additions of the parties;
3. The names and residences of the witnesses, or
4. The names of the notaries before whom it was passed, or of the notary who kept a minute thereof;
5. The description of the property conveyed, granted, or affected by such deed, conveyance or contract;
6. Its general purpose, nature, and character. (a)

184. Memorials of wills must state:

1. The day, month, and year of the date of the will;
2. The name of the devisor or testatrix;
3. The names and residences of the witnesses, or the names of the notaries before whom it was executed, or the name of the notary who kept a minute of the same;
4. The description of the real property devised or affected;
5. The nature, general purpose and character of such will. (b)

185. Memorials of notarial obligations must state:

1. The date of the obligation;
2. The names of the notaries before whom it was executed, or the name of the one who kept a minute thereof;
3. The names, residences, and additions of the obliger and obligee;
4. The sum or sums of money for which it was granted;
5. The description of the real property hypothecated or affected thereby. (c)

186. Memorials of judgments, judicial acts or proceedings must state:

(a) Ord. 4 Viet., cap. 30, s. 10.
(b) Ib., ib.
(c) Ib., ib.

1. The names, residences, and additions of the parties Plaintiff and Defendant;
2. The sum or sums of money thereby recovered or adjudged;
3. The time of the recovering of the judgment, or the completion and accomplishment of the judicial act or proceeding. (a)

187. Memorials of recognizances must state:

1. The date of the recognizance;
2. The names, residences, and additions of the cognizors and cognizees;
3. The sum or sums of money for which it was granted;
4. The name of the party before whom it was acknowledged;
5. The description of the real property affected thereby. (b)

188. Memorials of documents creating hypothecary rights or claims must state:

1. The names, residences, and additions of the creditors and debtors;
2. The date of the written security or document; (c)

(a) Ord. 4 Vict., cap. 30, s. 10.

(b) Ib., ib.

(c) As all memorials to be registered must be accompanied by the documents on which they are founded; and as, in point of fact, the word "memorial" is simply equivalent to analysis or summary, it would seem to follow that hypothecary or proprietary rights or claims which are founded on, or evidenced by no written document—such as the legal hypothec, or customary dower of married women—cannot be registered. This is an omission in the law which may lead to grave consequences. The authors of the law of Brumaire were careful to provide that legal hypothecs might be registered *sur la simple présentation de deux bordereaux*, specifying the names, &c., of the debtor and creditor, and the nature of the right (art. 21); and the Code Civil contains dispositions precisely similar (art. 2153). The authors of the Ordinance would perhaps have done well to follow so excellent an example.

The employment of the English word "*memorial*" in a law almost exclusively French, has led to many obscurities. The expression "registration of

3. The amount of the debt;
4. The nature, character, and general purpose of the document conferring or affording evidence of the hypothecary right;
5. The description of the real property charged or affected by such hypothecary right. (a)

189. Memorials of appointments of Tutors or Curators must state:—

1. The name, residence, and addition of the Tutor or Curator.
2. The names of each of the minors or interdicts.
3. The name and description of the Judge under whose authority the appointment was made.
4. The description of the property hypothecated, if the legal hypothec has been restricted to certain property; or a statement that the legal hypothec is to attach on all the property of the Tutor or Curator, if no restriction has been made.
5. The name, residence, and calling of the party who has made the memorial, if it has been made by any other than the Tutor or Curator (b).

190. Memorials on behalf of Her Majesty, her heirs or successors, must state:—

1. The date of the document.
2. The name and residence of the author of the memorial.
3. The name, residence, and calling of the debtor, or party against whom such memorial is to be registered.

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a memorial of a hypothec, or of a hypothecary right" is unintelligible, unless, by a powerful effort of the imagination, we succeed in identifying the abstract right called hypothec, with the document which serves to establish the fact of its existence.

(a) Ib., ib.

(b) Ord., 4 Vict., cap. 30, sect. 10.

4. The nature of the document of which a memorial is to be registered.
5. The nature and amount (if it be ascertained) of the debt, right, claim, or liability so secured (a).

191. Memorials of interest are apparently subject to all the above rules, except that, when founded on an authentic deed or document, they need not be attested on oath (b).

192. When the conveyance or security is made and perfected by several documents, each or more than one of which contains a description of the property affected, one description will be sufficient in the memorial, which may be taken from any one of the documents. Of the others, it will be sufficient to give the dates, the names, residences, and additions of the parties and witnesses, and to make a reference to the document of which a memorial has been registered according to the general rules, with directions how to find the registry of the same (c).

When memorials so made and executed, are presented, in the manner above mentioned, to the Registrar, by any person whomsoever, he is bound to enter them in the Book of Registries by memorial; and such registration avails to preserve the rights of all parties interested in the deed or instrument to which the memorial relates, with respect to immoveable property within the Registration District, County or Division in which the Registry Office is situate (d).

193. In like manner, if the Registrar be required by any party to register a document at full length, he is bound to do so. If the document in question be an authentic act, the party requiring its registration must produce it to the Registrar, or exhibit to him, in lieu of the

(a) Ord., 4 Vic., cap. 30., sect. 52.
(b) 7 Vict., cap. 22, sec. 10.
(c) 8 Vict., cap. 27, sec. 1.
(d) Ord. 4 Vict., cap. 30, sec. 13.

original, an authentic notarial, judicial, or official copy (a). If it be a deed executed before witnesses, such as a conveyance, mortgage, or will, the execution of such conveyance, mortgage, or will must be proved by the oath of one of the witnesses thereto. If the conveyance, mortgage, or will have been executed or published in the district in which the real property thereby conveyed, mortgaged, or devised, is situate, such oath must be made before the Registrar or his Deputy (b). If it have been executed or published in another district, the oath must be made before a Judge of the Court of Queen's Bench, or Common Pleas, or District Court, (Queen's Bench, Superior Court, or Circuit Court?) (c). If it have been executed or published in Great Britain or Ireland, the oath must be made before the Mayor or Chief Magistrate of any City, Borough, or Town Corporate (d). If it have been executed or published in any British Colony other than Canada, the oath must be made before the Chief Justice, or a Judge of the Superior Court, of such Colony (e). If it have been executed or published in a Foreign State, the oath must be made before a Minister Plenipotentiary, a Minister Extraordinary, a Chargé d'-Affaires or Consul of Her Majesty, accredited and resident within such State (f).

194. A registry at full length, made in accordance with the above rules, avails to preserve the rights of all parties interested in the deed, instrument, or writing, with respect to immoveable property within the Registration District, County or Division in which the Registry Office is situate (g).

(a) 7 Vict., cap. 22, sec. 5.
(b) Ord. 4 Vict., cap. 30, sec. 41.
(c) Ib., sec. 42.
(d) Ib., ib.
(e) Ib., ib.
(f) Ib., ib.
(g) 7 Vict., cap. 22, sec. 6.

195. The Registrar is further bound to grant a certificate of such registry. The certificate must state the day, hour, and time at which such registry was made, and the book, page, and number, in and under which it was entered; and must be signed by the Registrar or his Deputy (a). It must be endorsed upon the document or documents handed to the Registrar for registration; and if it or they have been registered by memorial, it must mention the circumstance. In the latter case, the memorial must remain of record in the office of the Registrar (b). Such certificates are evidence of the registry in all Courts of Justice (c).

196. It was declared by the Ordinance, that no hypothecs or hypothecary rights or claims could be effectually registered within the ten days preceding the bankruptcy of the debtor (d). As the bankrupt law has expired, it may be a question whether this provision of the Ordinance could be applied to cases of insolvency.

197. When a debtor pays the whole or a portion of a debt, for the security of which his property was mortgaged or encumbered, he is entitled to demand from his creditor a certificate of discharge for the amount paid, or a notarial act proving such discharge (e). Such certificate must be in writing, signed by the creditor, or his legal representative, and witnessed by two witnesses, who make affidavit before a Judge of the Court of Queen's Bench, or Common Pleas, (Superior or Circuit Court?) or the Registrar or his Deputy, that the sums for which the discharge is granted have been paid, and that they saw the creditor, or his legal representative, sign the certificate (f). If the

(a) Ib., sec. 11, 44.
(b) 8 Vict., cap. 27, sec. 1.
(c) 4 Vict., cap. 30, sec. 11, 45; 7 Vict., cap. 22, sec. 5.
(d) 4 Vict., cap. 30, sec. 18.
(e) 4 Vict., cap. 30, sec. 45; 7 Vict., cap. 22, sec. 8.
(f) Ord. 4 Vict., cap. 30, sec. 45.

creditor refuses to grant such a certificate or discharge, the debtor may institute an action against him therefor, and the judgment in such action, besides awarding damages against the creditor, may declare the hypothec or encumbrance reduced or discharged. (a)

On sight of such a certificate, notarial act, judgment, or matter of record, proving the total or partial discharge of any hypothec or encumbrance, the Registrar must make an entry in the margin of the Register, against the registry of the hypothec or encumbrance reduced or discharged, to the effect that such hypothec or encumbrance has been wholly or partially discharged. The certificate, notarial deed, judgment, or matter of record, proving the discharge, must remain of record in the Registry Office (b).

(a) 7 Vict., cap. 22, sec. 8.

(b) Ib., ib. There is no provision in the law for the radiation or erasure of a registry erroneously made against the property of an individual. "The Courts may order an inscription to be removed", says the Code Civil, (art. 2160,) "when it has been made without proper foundation in law, or on a written document, or when the creditor's title has been defective in form, &c."

CHAPTER VI.

OF THE OFFICE OF REGISTRAR.

198. The Registry Ordinance established Registry Offices in each of the judicial districts into which Lower Canada was divided. When the Judicature Law was remodelled, in 1843, and the District and Division Courts abolished, the Legislature declared that a Registrar should be appointed for each County, and confined his functions to the registering of documents affecting real property within the limits of the county (a).

199. He is appointed by the Governor, and in case of his resignation, death, or removal, his successor must be named in like manner (b).

200. Before entering on the discharge of his functions, the Registrar must take the oath of allegiance, (c) which is in the following terms:

(a) 7 Vict., cap. 22, sect. 1, 2. Alterations in the limits of some of the Registry Offices have been effected by special acts. See the table published in the almanacs.

(b) 7 Vict., cap. 22, sect. 2.

(c) Ord. 4 Vict., cap. 30, sect. 8.

"I, A. B., do sincerely promise and swear that I will "be faithful, and bear true allegiance to Her Majesty "Queen Victoria (or the reigning Sovereign for the time "being), as lawful sovereign of the United Kingdom of "Great Britain and Ireland and of this Province, depen- "dent on and belonging to the said Kingdom, and that I "will defend her to the utmost of my power against all "traitorous conspiracies or attempts whatever, which shall "be made against her person, Crown and Dignity, and "that I will do my utmost endeavour to disclose and "make known to Her Majesty, her heirs and successors, "all treasons, or traitorous conspiracies or attempts which "I shall know to be (*sic*) against her or any of them—and "all this I do swear without any equivocation, mental eva- "sion, or secret reservation, and renouncing all pardons "and dispensations from any person or persons whatso- "ever to the contrary; So help me God." (a)

He must also take the oath of office, in the following form:

"I, A. B., Registrar (b) for the County (or Registration "District or Division) of , do solemnly "swear that I will truly, honestly, and faithfully perform "and execute the office of Registrar for the County (or "Registration District or Division) of , "and all and every the duties enjoined and required to "be done and performed by me as such Registrar, in and "by an Ordinance of the Legislature of this late Province "of Lower Canada, made and passed by the Governor "of the said Province, by and with the advice and con- "sent of the Special Council for the affairs thereof, inti- "tuled, 'An Ordinance to prescribe and regulate the "'registering of titles to lands, tenements, and heredita-

(a) 13 and 14 Vict., cap. 18, sect. 2.

(b) When this oath is taken by the Deputy Registrar (see Post No. 202) the words "Deputy Registrar" must be substituted for "Registrar" wherever it occurs.

" ' ments, real or immoveable estates, and of charges " ' and encumbrances on the same; and for the alteration " ' and improvement of the law, in certain particulars, " ' in relation to the alienation and hypothecation of real " ' estates and the rights and interest acquired therein,' " so long as I shall continue in the said office; and that " I have not given or promised, directly or indirectly, nor " authorised any person to give or promise any money, " gratuity, or reward whatsoever, for procuring or obtain- " ing the said office for me.—So help me God." (a)

201. Before entering on the duties of his office, he must likewise enter into a recognizance with not more than four and not less than two sureties, to be approved by the Justice before whom the recognizance is taken, who shall be jointly and severally bound to Her Majesty; as a security both to the Crown, and to all parties who may recover damages against him in a Court of law, for or by reason of misconduct, negligence, or default in the discharge of his duties (b). The amount of such recognizances is fixed by the following scale:

That of the Registrar of the Counties of Quebec and Montreal need not exceed £4000
Do. do. of the other Counties in Lower Canada . 2000
Do. do. of Registration Districts or Divisions being less than the Counties . . . . . 1000 (c)

The recognizance must be fyled of record in the Courts of Queen's Bench or Superior Court (d): and a duplicate copy thereof must, within a delay of one month, if the Registrar be within the Province, and of three months, if he be without the frontier, be recorded at length by the

(a) Ord. 4 Vict., cap. 30, sect. 8, and Appendix.

(b) Ib., ib.

(c) 14 and 15 Vict., cap. 93, sect. 2. By the same Act, all recognizances granted before its passing, for larger sums than these, are reduced in conformity with the scale given in the text.

(d) Ord. 4 Vict., cap. 30, sect. 8.

Provincial Registrar, and afterwards deposited in the Office of the Inspector General of Public Accounts (a). If a Registrar neglect to comply with these requirements of the law, his commission may be declared avoided within the above mentioned delays, and another party may be appointed to the office (b).

If any of his sureties become insolvent or bankrupt, die, or leave the Province, he must notify the circumstance to the Provincial Secretary within the same delays as those above mentioned: under penalty, in case of neglect, of a fine of one fourth the amount of the liability of the surety so discharged (c). He must also within a like period (which may be extended by the Governor to three and five months, according to the residence of the parties) provide a new surety in the room of the one so discharged; under penalty, in case of his failure so to do, of the forfeiture of his office (d).

The recognizance granted by a Registrar becomes void three years after his death, removal, or resignation, provided that no misconduct shall up to that time appear to have been committed by him, or his Deputy (e).

202. Within twenty days after the Registrar has taken the oaths he must appoint a Deputy, under penalty, in case of neglect, of five pounds fine per day (f). The Deputy must take the same oaths as the Registrar (g): and is competent to discharge all the duties of the office. He is bound to "execute the office of Registrar" in case of the death of his principal (h). It does not appear,

(a) 4 and 5 Vict., cap. 91, s. 3, 14.
(b) Ib., sect. 5.
(c) Ib., s. 6.
(d) Ib., s. 7.
(e) Ord. 4 Vict., cap. 30, s. 9.
(f) Ib., s. 6.
(g) Ib., s. 8.
(h) Ib., s. 6.

however, that he is bound to give security or to enter into a recognizance (a). If the Deputy die, resign, or be removed, the Registrar must appoint another within a delay of twenty days: under penalty of five pounds fine for each day's neglect (b).

203. The Registrar must reside within five leagues of his office (c). His office must be open for the transaction of business on every day except Sundays and Holidays from 9 till 3: during which time, the Registrar or his Deputy is bound to register documents and memorials, to grant certificates, and to make searches when required so to do by any party (d).

Every Registrar is required to keep a set of books, the form and object of which is prescribed by law.

204. He must have two Registers, one for registering deeds and documents at full length, and the other for memorials (e). Each must be authenticated by a memorandum made by the Prothonotary on the first page, stating the object for which the Register is intended, and the number of pages it contains, and must be dated and signed by the Prothonotary. Each page must be numbered in letters by the same officer, and the numbers *paraphés* by him. Memorials must be entered in the Register appropriated to them, consecutively, without any blank or space between them. They must be numbered, and the number and date must be mentioned in the margin. This rules apply equally to the Registers for the Registration of documents at full length (f).

(a) See, however, 4 and 5 Vict., c. 91, s. 14.

(b) Ord. 4 Vict., c. 30, s. 6; 12 Vict., c. 48, s. 3.

(c) 14 and 15 Vict., cap. 93, s. 3.

(d) Ord. 4 Vict., cap. 30, s. 49. No provision is made in our law for the deposit of the Registers and Deeds in fire proof vaults: a grave omission, which ought to be remedied without delay. The Upper Canadians have evinced more prudence. See 9 Vict., cap. 34, sect. 19.

(e) Ib., s. 19, 40; 12 Vict., cap. 48, s. 2.

(f) Ord., 4 Vict., cap. 30, sec. 19, 40; 12 Vict., cap. 48, sect. 2.

205. By a recent act, the Registrars of the Counties of Quebec and Montreal are permitted to keep separate registers for the registration of—

1. Bonds, recognizances, and other securities in favour of the Crown: also wills and testaments, and office copies or probates of wills and testaments.
2. Marriage contracts and donations.
3. Appointments of Tutors or Curators, judgments, judicial acts or proceedings.
4. Deeds of alienation and conveyance not included in the above mentioned classes, including leases for more than nine years, exchanges and partitions.
5. Documents creating mortgages, privileges, hypothèques, or encumbrances, not included in any of the above classes.
6. All other deeds and instruments or writings not herein above included (a).

206. Besides these registers, registrars must keep a "Minute or Day-Book", "in which shall be entered the "year, month, day, and hour when any memorial shall "be brought for registration, the names of the parties in "such memorial, and of the person by whom such me-

(a) 12 Vict., cap. 48, sec. 2, 3. But the Law distinctly provides that no legal consequences shall flow from the registration of any of these documents in the wrong register: and no practical benefit would appear to flow from the adoption of a classification so obviously capricious. This new enactment, moreover, is calculated both to increase the expenses of the registrars without increasing their emoluments, or facilitating the public service, and to cause much confusion, and risk of error in the indexes and registers. No provision is made by the 12 Vict. for the *numbering* of the documents in the separate registers, while other Laws in force require all documents which are registered to be numbered in the order in which they are received, and entered consecutively, so as to leave no blank or interval between them. The adoption of the new system is also likely to produce great difficulty and risk of error in making "searches"; which, indeed, if fully carried out, it would render entirely nugatory.

"morial shall be brought, the nature of the instrument or "right or claim, whereof registration is hereby (by the "Registry Ordinance) required, and a general designa- "tion of the real estate intended to be affected by such "memorial" (a).

207. He must also keep two indexes: one containing, in alphabetical order, the names of the parties against or in favour of whom, documents have been registered, and referring to the page of the register, the number of the memorials or documents registered, and the situation of the property affected: the other containing an alphabetical list of all parishes, townships, seigniories, cities, towns, villages, and extraparochial places within the county, and referring to the page of the register, the number of the memorials or documents registered, the names of the parties, and the property affected (b).

208. These several books must be similar to those provided by the Province for the first Registry Offices that were established under the Ordinance (c).

When a registrar is removed or resigns, he must surrender these books to his successor; his neglect or refusal so to do, besides exposing him to an action of damages, is held to be a misdemeanour in law. In case of his death, a like duty is incumbent on his heirs or representatives (d).

209. His fees are as follows:—

For transcribing documents at full length, or memorials, when they do not exceed 400 words, he is entitled to, . . .	£0	2	6
For each additional 100 words, ...	0	0	6

(a) Ord., 4 Vict., cap. 30., sec. 20.

(b) Ib. ib. This index is utterly useless. Without a registration map, or Cadastre, an index to estates can afford no information to any one, and may lead to serious inconvenience.

(c) Ib. sec. 54.

(d) Ib., sec. 47.

For each search when the names of the parties are given, ...	0	1	0	
For each search when the names are not given, ...	0	2	0	
For each certificate of registry by memorial,	0	1	6	
For each certificate of registry at full length	0	2	6	(a)

When a registrar is convicted of undue or fraudulent practices or neglect in the discharge of his functions, his office is forfeited; and he may be condemned to pay treble damages, with full costs of suit, to any party injured—to be recovered by action of debt or information (b).

210. False oaths sworn before a Registiar, or his deputy, or before a Judge, or a Court, under the provisions of the Registry Ordinance, are held in law to be wilful and corrupt perjury (c).

211. The forgery of a certificate of registration, o· of a memorial of a deed, will, or other instrument, is declared by the Forgery Act to be felony, and made punishable by imprisonment in the Penitentiary for not less than four, and not more than ten years (d).

(a) Ord., 4 Vict., cap. 30, sec. 48; 8 Vic., cap. 27, sec. 1.
(b) Ord., 4 Vic., cap. 30, sec. 50.
(c) Ib., sec. 51.
(d) 10 & 11 Vict., cap. 9, sec. 9.

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